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OUGHT ATHEISTS TO BE RECEIVED AS COMPETENT WITNESSES?[1]

The exclusion of Atheists from the witness-stand has long been a subject of discussion. In many States, their testimony is now received, but the fact of their unbelief is allowed to be proved to affect their credibility. A bill containing such a provision was passed almost unanimously, last winter, by the Senate of Massachusetts; but it was lost in the House. The subject has lately been brought into notice, by the rejection of a material witness, in a Patent case tried before Judge Sprague.[2] Of course, the duty of courts in the present condition of the law is clear, but the question will continue to be raised before

[1] We admit this article into our columns without agreeing either to its arguments or conclusions, but to discuss a question of great theoretical and practical importance, not only to the profession but to the public. Like most other questions, it has been the subject of frequent and excited debate, and the history of legislative action upon this subject, as upon most of the so-called reforms of Law, show that the strictness of the rule respecting atheists has been much relaxed. We would refer our readers for an able and argumentative discussion of this question, in which opposite views are taken, to an article in the Law Reporter for April, 1839, (Vol. I, p. 345.)

[2] This case was *Howe et al.* v. *Bradford*, tried in the Circuit Court for the District of Massachusetts, at its present (May) Term. "It should be stated in connection herewith, that the deposition of this same witness, previously taken, had been read to the jury by the defendant's counsel without objection; and afterwards, that they offered the witness on the stand to new matter, and then the above objection was taken by the plaintiff." Upon the evidence, which was very full, given to the court, and after able and extended arguments, (Mr. Choate and Hon. A. L. Jordan of New York were the senior counsel respectively,) the court found as a fact "that —— ——, a witness offered by defendant, did not believe in the existence of a God who punishes perjury," and he was not permitted to testify.

the legislatures of the several states that hold to the old rule.

It seems to us that both sides have generally argued this question upon mistaken grounds. On the one hand, the reception of an atheist's testimony has been objected to as an encouragement to unbelief. On the other hand, unbelievers have claimed a natural and constitutional right to testify in the Courts. But the true question is, how can truth best be obtained, and how can justice be most certainly done? The evidence of the atheist, if it ought to be received at all, should be received, not because it is the right of a witness to testify, but because it is the right of the party to have the benefit of his testimony. The hardship, if there is any, in rejecting an unbeliever, is not upon the witness, who is rejected, but upon the man who is deprived of his property, or who suffers an unjust conviction for want of his evidence. Or, in some cases, the state is the party wronged, and crime goes unpunished, because the facts are only known to an infidel. The legal objections to the reception of such testimony lie in the increased danger of falsehood from this class of witnesses, and in the fact that they cannot testify under the sanction of an oath.

In our view, these objections are not sufficient. It seems to us that the purposes of justice will best be attained by receiving the evidence of all persons, not parties to a suit, whatever be their belief, their character, or their interest in the cause, leaving all these matters alike to the consideration of the jury. The reason for this is a simple one. We know that false testimony does not necessarily follow from unbelief, from bad character, or from interest. The law receives the evidence of bad men, and of interested men, although there is danger that such evidence will be false. And the danger of false testimony from atheists is not so great as to demand their exclusion. It will be universally granted that the atheist may be a truth-telling man; but his evidence is rejected, because his want of belief *tends* to make him a false one. But the man, whose reputation for truth is notoriously bad, is admitted to the witness-box. Why should a *tendency* to falsehood exclude a witness, while habitual falsehood does not?

The injustice of such a rule is more glaring, now that conviction of crime has ceased, in so many states, to disqualify witnesses. We admit the forger and the thief. We

receive the evidence of the man who has been condemned for perjury. Is it not quite as safe to admit the unbeliever? Would it be just to accuse a man of crime, on the testimony of a convict from the state's prison, and to deprive the prisoner of his defence, if it happened to rest upon the evidence of an upright and honest atheist? A common prostitute is allowed to testify, and, in the courts of Massachusetts, her occupation cannot be shown even to affect her credibility. But there are few men who would not trust life, or liberty, or reputation to the word of an atheist, rather than to the oath of a prostitute.

The danger of false testimony from an unbeliever seems to have been greatly overrated. Although he lacks some of the motives that influence a Christian, he is not without motives to be true. Besides the natural impulse to speak the truth, he is influenced by the fear of detection, and the chance of punishment. Nor is he necessarily deprived of the highest motive for truthfulness, — the obligation of duty; for the ideas of right and wrong are not unknown to the mind of an atheist, any more than they were to the systems of the heathen philosophers. It is well known that many atheists have been men of strictly moral lives, that they are sometimes scrupulously correct, on account of the suspicion to which they are exposed. On the other hand, a vast proportion of the race, in countries nominally Christian, are practically atheists. They pay no regard to honesty, to the social virtues, to duty or to truth. In the language of theologians, they live "without God in the world." It is hard to see the propriety of allowing this large class of men to testify, while we reject the man, who is in name, what they are in reality. We admit the tendency of atheism to harden the heart, and to produce the depraved state to which we allude. But we think it unjust that while such depravity does not disqualify one witness, another should be disqualified by one of its causes.

It is admitted, that an atheist may be a good citizen, a good neighbor, a man of honor, and a man of integrity. But he is not allowed to give evidence, because atheism sometimes renders a man dishonest. But the blasphemer, the drunkard, the gambler and the rake, are admitted to the witness-stand, although their habits seem to be fully as corrupting as the atheist's want of belief in God. The line, which includes them, and rejects him, is not drawn by sound logic, or plain common sense. The rule is not

one which guides us in the affairs of life, or in the relations of business.

Again, all atheists cannot be prevented from giving evidence, but only those who confess their unbelief. The hypocrite, of course, cannot be rejected. But the profession of unbelief is often the result of honesty. There is very little temptation for any man to make such profession; there are strong reasons for keeping silence. An atheist must be blind and foolish; he is an object for pity and for censure; but if he admits his want of faith, he is not a hypocrite; he has given one proof of sincerity, and by so doing, he renders himself incapable of testifying in our courts. If he had concealed his sentiments, and made false statements of his faith, he would have been qualified to appear as a witness.

The objection to receiving evidence, unconfirmed by an oath, is a plausible one. But our law-givers, knowing that a witness may testify without that obligation, have provided that a large class of persons may give evidence, unsworn. Thus, they admit that an oath is not indispensable. Every man, whether sworn to tell the truth or not, is bound to do so; but it is well to add every sanction that we can, to enforce this duty. Therefore, an oath is required of every man who can take one; but there seems to be no objection, on the ground of principle, to receiving the affirmation of the Atheist, as we now receive it from the Quaker. Undoubtedly, the jury should watch the testimony of such a witness closely. They should consider that he testifies without the solemn form of an oath, without the fear of future punishment, without any sense of the presence of God. They should make proper allowance for the want of all these sanctions. And if, after all, the appearance, and the character, and the evidence of the witness, are such that he is believed by the jury, there will be little danger of injustice from that source. Some men will shudder at the idea of having their property or their good name risked on the unsworn statement of an atheist. Their fear springs in part from a just and natural sentiment, and, in part, from prejudice. But they may be sure, that the same feelings existing in the breasts of the jurors will save them from any wrong. There is little fear that such feelings would not have their due weight.

It seems to us that the only sound objections to the admission of unbelievers as witnesses are met by allowing

the jury in each case to consider their unbelief as affecting the value of their testimony; and that its reception is required by a regard for justice and for consistency in the administration of law.

The importance of the subject becomes more apparent from considering some of the practical inconveniences of the present rule. Not only may an honest man lose a just case, because his chief witness is an atheist; not only may he be surprised and ruined by having this objection raised in the midst of a trial; but even if the witness professes to believe, and does believe in all the doctrines of Christianity, he may be rejected, on proof of his former declarations. Some loose expressions, uttered in jest or in the heat of debate, are quoted or misquoted against him, and if they amount to an expression of atheism, the court cannot listen to the witness' declaration of faith. Thus, many a man has been proved to be an atheist in spite of himself. We have seen an important suit decided by the rejection of a witness, a man of strict integrity, who utterly denied that he was an unbeliever, and declared his faith in God. There is more danger of such cases, where discussion is as free, as general, and as warm as it is in New England. It may be said, that a man who talks loosely about theological subjects is properly punished for his folly and his presumption, by his rejection from the witness-stand. But he is not punished. His neighbor, whose property or reputation depends upon facts within the knowledge of the witness, may be ruined, and this is the injustice of which we complain.

The rejection of atheists makes it easy for any one, who is unwilling to testify, to disqualify himself. And practical inconvenience has more than once arisen from this cause. For instance, a friend of the accused is the main witness of the facts charged against him. He cannot deny what he has seen; he does not incur the danger of perjury; but he only needs to declare his unbelief, in or out of court, and the guilty man goes free. If it is said that the testimony of such a worthless man would be of no value, we answer, that unwilling evidence wrung from such a man against his wishes, might be of great worth, and that many men would deny their faith in God, who would not dare to commit perjury.

We have argued this question upon legal grounds; we have looked upon the rules of evidence solely as means of

excluding falsehood, and of attaining truth. And we believe this to be the correct way to look at the subject. We doubt the right of the legislature to sacrifice justice, to rob one guiltless man, and to imprison another, for the sake of upholding any faith, however sacred. And we feel sure, that nothing is gained for Christianity by such a course. On the other hand, by receiving the evidence of atheists, we shall not only secure greater justice; but we shall take away from infidels one means of gaining proselytes; we shall cease from the appearance of persecution; we shall prove our faith in our own creed, and shall do something to prove that we are Christian in feeling as well as in name.

Recent American Decisions.

Supreme Court of Vermont, Franklin County, Jan. Term, 1852.—Decided at the Circuit Session, June, 1852.

Administrators of GARDNER G. SMITH and others *v.* The Administrators of JONATHAN WAINWRIGHT.

Bill in Equity — Equitable Jurisdiction — Set-off — Bond — Penalty — Damages — Practice in Equity.

The decease of a party an obligor in a bond, and also the holder of notes given by the obligees in the same bond for the same consideration upon which the bond was given, and the mere representation of his insolvency, his estate being confessedly solvent, is no reason why a court of equity should interfere in favor of the obligees, and decide that the amount of the notes should be set off against the sum due on the bond, and render a decree in favor of the obligees for the balance, if any. But if the obligees in the bond, being the makers of the notes, are insolvent, a court of equity will interfere in favor of sureties who signed the notes upon the security of the bond, and will decree a set-off of the amount due on the notes against what was due on the bond. The consideration that the nominal parties to the contracts are not strictly mutual, is not a valid objection to decreeing a set-off in equity, if the real parties upon whom the burden is ultimately to fall are the same.

Where S. and others bought of W. his interest in, and the good-will of, the manufacturing and sale of certain articles, within a certain district, and gave notes to the amount of $8000 therefor, and W. at the same time executed to S. and the others a bond "in the penal sum of ten thousand dollars," conditioned to be void "if the said W. shall hereafter wholly refrain from manufacturing and vending," &c., and a breach of said condition by W. was proved; *held*, that under the circumstances of the case, the sum so named in the bond was a penalty, and not liquidated damages.

The refusal of the chancellor in the court below to allow a party to file a supplemental bill before the original one comes to a hearing, is not a final decree, from which, in the first instance, an appeal lies; nor is it strictly revisable in the superior court, being a matter of discretion.

But where such refusal proceeds upon special grounds, which are shown to have been misapprehended, the party, after correcting this misapprehension, will be permitted to renew his application.

Where a bond is executed to three persons jointly, — their assigns, administrators, &c. not being named in the bond, — their interests being also joint as purchasers of the business of the obligor of the bond, and the nature of the covenants showed that they were not founded upon any personal confidence in the three persons to whom the bond was executed, and where both parties expected the bond to enure for the benefit of the business sold out, and where the obligor had repeatedly assented to his liability after a change in the parties to whom the bond was executed, a court of equity will hold the obligor liable on his bond, not only for damages accruing from breaches thereof while the original parties to the bond remained unchanged, but for those from breaches after the change of parties.

The facts of the case sufficiently appear in the opinion of the court, which was delivered by

Redfield, J. This bill is brought by Gardner G. Smith, Seth P. Eastman, Abel Houghton, John Smith, Henry Adams, and Francis J. Houghton. The bond, upon which the orator's claim is predicated, was executed to Gardner G. Smith, Seth P. Eastman, and Horace B. Foster, on the 9th day of June, 1841, to secure to them Wainwright's good will in the sale and manufacture of iron castings, stove pipe, tin ware, &c. in the counties of Franklin and Grand Isle, and a defined portion of the Province of Canada, and to exclude Wainwright from all manufacture or trade in such article within the aforesaid district. Wainwright's bond is in the penal sum of ten thousand dollars, conditioned to be void "if the said W. shall hereafter wholly refrain from manufacturing or vending," &c.

A good deal is said in the bill, which might look like an inducement to a charge of fraud in Wainwright in obtaining the sale, by representing his "good will" in this trade as being of more value than it was. But taking the bill altogether, it seems, that these allegations are introduced rather to show the high value placed upon this "good will" by the parties, and that it was considered a chief inducement towards the trade upon the part of Smith and other's.

The bill then charges, that the ten thousand dollars was understood and agreed damages between the parties, to become an absolute debt due the obligees, upon the slightest failure to perform on the part of Wainwright.

The bill then prays, that the notes given by the obligees for the purchase of Wainwright's stock in the trade and the good will of the business, amounting originally to some eight thousand dollars, a portion of which has been paid, may be surrendered and applied towards the sum due upon the bond, and the estate of Wainwright be decreed to pay the balance to those entitled to receive it, being a portion of the orators.

The breach alleged in the bill, is the carrying on the business of vending, within the prohibited limits, both by Wainwright in his lifetime, and by the administrators, in that capacity, since his decease. But it is not claimed, that there is any evidence of any act of sale by the administrators in the prohibited district. That is all which requires to be said upon that part of the case.

At the bringing of the bill, and before the death of Wainwright, the partnership of the obligees, after being twice changed, was finally dissolved in August, 1844, and Gardner G. Smith became sole proprietor in the business; and he or his estate has been solely interested in it since that time. Foster, one of the original purchasers and obligees in the bond, sold out to his associates, September 27, 1841; Francis J. Houghton bought into the concern, as from the beginning, as is alleged in the bill, 26th August, 1842, and Houghton and Eastman finally sold out to Smith, in January, 1844, and the partnership was closed up and dissolved in August, 1844.

Henry Adams, John Smith and Abel Houghton, have, at different times, signed the notes to Wainwright, as sureties, either for the original purchasers, or for those who subsequently came into the concern.

The only reasons urged in the bill, for applying to a court of equity, are the decease of Wainwright, and his estate being represented insolvent, and the allegation that the sureties signed in faith of Wainwright's faithfully performing the condition of his bond, and that without that they would not have signed without security.

This last reason does not seem to us to amount to much any way. In the first place there is no proof whatever, and no reasonable probability, that these sureties made a principal reliance upon Wainwright's bond, as a leading motive for assuming the obligation of suretyship. It doubtless formed an ingredient, (operating more or less upon the different persons,) constituting, with numerous other things, the consideration, or compound motive force, inducing them to become sureties. But there remain two serious objections to the interference of a court of equity, upon this ground, even if it were an acknowledged fact that this bond formed the chief motive to the sureties to become such: 1. There is an obvious want of privity, in regard to this bond, between the sureties and Wainwright, which would, under ordinary circumstances, render it unreasona-

ble to require Wainwright to litigate the matter with parties so remotely related to him in the original transaction; and 2. There is on the face of the thing an apparent adequate remedy upon the bond itself, in a court of law, which would induce a court of equity the more to hesitate, in extending its functions to embrace matters not obviously and primarily within its acknowledged jurisdiction.

The only remaining ground of equitable interference, stated in the bill, is the decease of Wainwright and the representation of insolvency. On a motion for leave to file a bill, in the nature of a supplemental bill, before the court of chancery, it was ruled by that court that the facts proposed to be added, viz., the insolvency of the principal signers of the notes and upon whom the primary obligation of payment rested, was not important to the plaintiff's case. So that if this court deem those facts important, they are to be taken as virtually in the case.

Whatever is said in the case, then, in regard to Wainwright's representations to induce the trade, being laid aside as not in themselves amounting to any distinct and tangible fraud; and secondly, as being virtually merged in and superseded by the bond which was executed by Wainwright, and above all, as forming no distinct ground upon which relief is claimed in the bill; we have remaining the decease and representation of insolvency of Wainwright, and the decease and insolvency of Gardner G. Smith, upon whom in equity the ultimate primary obligation to make payment of these notes rests, and possibly of some other of the original principals, who have now become sureties, for the estate of G. G. Smith, although, as between themselves and their sureties, they must still stand as principals. And we must regard the sole object of the bill to be to obtain a set-off of whatever sum is due upon the notes against the sum due upon the bond, and a decree for the balance. For although the bill contains the general prayer for relief, it points to no other relief but a set-off, and there is nothing in the case showing any ground or pretence for any other relief. To examine the case in this view: —

1. This set-off is claimed upon the sole ground, that the ten thousand dollars named in the bond as the "penal sum," are in fact liquidated damages, to become due to the obligees absolutely, and at once, upon the slightest breach of the condition of the bond. This is the sole and exclusive basis upon which the offset is prayed. It seems in the

outset not to have been supposed, that an offset would be likely to be decreed of a mere unliquidated sum in damages, until it should become liquidated by the verdict of a jury, or in some other mode known to the courts of common law or agreed by the parties. We infer that this was the view taken of the case by the counsel of the orators at the time of framing their case, because the bill does not even present the alternative of the court regarding the damages as unliquidated, except as it may be regarded as included probably under the general prayer for relief. And it seems to be well settled, at law, that if the claim rests in mere unliquidated damages, it cannot be set off, but a sum agreed, as liquidated damages, may. Chitty on Contracts, 844, and cases cited in note; *Gillett* v. *Mawman*, (1 Taunt. 137.)

2. Upon the question, whether the ten thousand dollars named in the body of the bond are to be regarded as liquidated damages, or in the nature of a penalty, the cases may not be found altogether consistent with each other. But it seems to us that there can be no reasonable ground of doubt as to this particular case. It is expressly declared to be a penalty in the contract itself, which, although not conclusive altogether, seems to be regarded as nearly so in one view, *i. e.* where the sum is declared to be a penalty; although the converse does not always hold equally, when the sum is declared to be agreed damages. But where the sum stipulated is expressly denominated a penalty, or a penal sum, I find no case where it has been held liquidated damages, or where any doubt has been entertained upon the subject, except as between landlord and tenant. *Jones* v. *Green*, (3 Y. & J. 304.) The case of *Farrant* v. *Olmins*, (3 B. & Ald. 692,) cited by plaintiff's counsel, is of this character; and so also what is said by Comyn in his Landlord and Tenant, 324, 325, also referred to by plaintiff's counsel. The only remaining case, to which they have referred us, in support of their claim to treat the ten thousand dollars, named in the bond of the intestate, as liquidated damages, is *Peirce* v. *Fuller*, (8 Mass. 223.) This case in some respects favors the plaintiffs' claim, inasmuch as it was an agreement to refrain from opposition to plaintiffs' business. But the sum fixed there was of a character to show that the parties had pared it down to stipulated damages, being two hundred and *ninety* dollars, if defendant should run a stage on a particular road.

There are some other cases, not referred to in the argument, which go to show that the courts in this country and in England incline to treat these contracts for the sale of the good will of a particular business, or an agreement to refrain from the exercise of a given business, in a specified district, as fixing the quantum of the damages, to be recovered for breach of the contract, where the terms made use of by the parties will reasonably bear that construction. *Dakin* v. *Williams* (17 Wendell, 447), and *Williams* v. *Dakin* (22 Ibid. 201), is where the plaintiff gave three thousand dollars for the good will of a newspaper establishment, and five hundred dollars for the type and printing apparatus, and took a bond from the vendors not to publish or aid in publishing a rival paper, and upon failure, to pay three thousand dollars. This was very justly held to be liquidated damages.

But in the case before us, the property sold seems to have been fixed at what was esteemed its fair valuation, and we do not learn that any thing specific was added for the good will. And the whole sum paid was only about eight thousand dollars, and the bond is ten thousand dollars. And while we must, at once, perceive that the bond was an important consideration in inducing the bargain, without which one could scarcely be induced to buy the remnant of a long trade at any price, and that it might have very considerably increased the price paid, still there is no pretence that the parties could have considered the sum of ten thousand dollars, as liquidated damages for a single violation of the obligation, or even for a continued violation thereof. And in fixing a construction upon the contracts of the parties, we are bound to do it, with reference to the surrounding circumstances.

The recent case of *Sainter* v. *Ferguson*, (7 Man. Grang. & Scott, 716; 62 Eng. Com. Law. R. 716,) where the defendant agreed not to practise as a surgeon under a penalty of five hundred pounds, and the court held the amount liquidated damages, is the strongest case I have found, in favor of the plaintiffs. But that case, in my opinion, bears no just analogy to the present, in its facts and circumstances. And it is there considered (by Chief Justice Wilde) a question of construction for the court, dependent upon the facts and circumstances which appear in and surround the case. The point of the damages was very little considered. The current of the cases, early and

late, where the subject has been much considered by the courts, undoubtedly is:

1. That where there is any reasonable doubt, upon the face of the instrument, how the parties intended it, it shall be construed as a penalty merely. *Davis* v. *Penton*, (6 B. & C. 216; 13 Eng. C. L. R. 147.) Opinion of Chief Justice Best, in *Crisdee* v. *Bolton*, (3 C. & P. 240; 14 C. L. R. 286.) This was an agreement for the sale of a public house, and an agreement not to be engaged in the business of a publican, under the penalty of five hundred pounds; "the same to be recovered as and for liquidated damages." This was held at *Nisi Prius* to be liquidated damages; and the jury having been asked to pass upon the question of actual damages, and having assessed them at the same sum, the full bench refused to grant the rule to show cause why a new trial should not be had; the jury having assessed the actual damages at the same sum as the penalty. The case of *Shute* v. *Taylor*, (5 Met. R. 61,) seems to have gone upon the general ground, that in doubtful cases the courts should construe the sum as a penalty.

2. It must be regarded, as a settled general rule, upon this subject, that where the sum is named as a penalty, in the contract, and no stipulation that it shall be regarded as liquidated damages, it can only be regarded as a penalty. Chitty on Contracts, 867, and note *n*. *Taylor* v. *Sandiford*, (7 Wheaton, R. 13; 5 Pet. Cond. R. 210.)

The language of Chief Justice Marshall, in the last case, applies with great force to the present one. "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. It will not, of course, be considered as liquidated damages; it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties." "Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one." "The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention." We could add nothing more as applicable to the present case, and the facts and circumstances require or justify nothing less.

Notwithstanding this case contains some of those features, which have been sometimes seized hold of, for the

purpose of justifying an opinion, that the sum should be regarded as liquidated damages, viz., that it is a contract for the good will of a trade or business; that it is for the abstaining from doing an act, and one which one is in no likelihood of doing involuntarily or through inadvertence, and that the breach of the bond consists of a single act, or two at most; still it seems to us, that it is little short of absurdity to say, that under the circumstances attending the giving of this bond, and the terms used, it could have been intended that this sum of ten thousand dollars, which, in terms, is denominated by the parties a penal sum, is, nevertheless, no penal sum, but liquidated damages, and was so intended by the parties. The case of *Boys* v. *Angell*, (5 Bing. N. C. 390,) and *Kemble* v. *Farren*, (6 Bing. N. C. 141,) strongly favor this view. In the latter case the contract of the parties was explicit, that the sum should be "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." And still the court held it a penalty and nothing else. We conclude, then, that this sum of ten thousand dollars, named in the bond, as the "penal sum," must be so regarded by this court. The language of the court, in the last case, shows how much the courts incline to regard all doubtful cases of this class, as penalties, and especially so when the contract so declares.

This determination must be regarded, we think, as disposing of the ground upon which the plaintiff placed chief reliance, at the time of bringing the bill.

But it is insisted, that if the principals are entitled to a sum in damages, which is unliquidated, a court of equity will, under peculiar circumstances, entertain a bill for an offset, and liquidate the matter, or allow the party to proceed at law, and obtain a liquidation, and then decree an offset. This has, no doubt, been done under circumstances of peculiar equity. That was expressly decided by this court, *Nims* v. *Rood*, (11 Verm. Rep. 96,) and also in *Foot* v. *Ketchum*, (15 Ib. 258.) The usual course in such cases is, to refer the party to a court of law, as was done in the cases last cited. Any thing short of this would be regarded as offering a temptation to suitors, under circumstances, to withdraw matters from the common law courts, in order to have them litigated in the court of chancery, to the prejudice of the legitimate suitors in that court, and the burden and embarrassment of that court

with matters not appropriately belonging to them. And it might sometimes be regarded as giving the orator an unequal option, in selecting the forum for trial. These considerations, and the farther one, that if there is any claim for damages, growing out of the breach of this bond, it is a matter resting altogether *in pais*, depending upon a multiplicity of evidence, and that very conflicting, and so entirely appropriate for the consideration of a jury who can have the witnesses before them. All this would induce us, if there is any claim of this kind, upon which, if the principals should prevail, there would be an equity in the orators, or any of them, in claiming to have a set-off against these notes, to refer the liquidator of the matter to the tribunal having the common law jurisdiction of the claim.

We must inquire then, whether, if such a claim should be established at law, there is any sufficient ground made out for the interference of a court of equity, to decree a set-off? The consideration, that the nominal parties to the contracts are not strictly mutual, is not now regarded as any valid objection to decreeing a set-off in equity, if the real parties, upon whom the burden is ultimately to fall, are the same. The subject is sufficiently discussed in *Downer* v. *Dana*, (17 Verm. R. 518,) and in *Blake* v. *Langdon*, (19 Ib. 485.) I should not now desire to add to what is there said. These cases show, that if the plaintiff here made out a case of the utter insolvency of one or more of the principals in these notes, the sureties would have an equity to compel the application of any sums due the principals from Wainwright's estate, before they were compelled to make any payment out of their own funds. So, too, if the principals were solvent, and Wainwright's estate insolvent, they might compel the application of any sum due them from Wainwright's estate, notwithstanding the notes were signed by the other parties, as mere sureties.

But it seems to us that the decease of Wainwright, and the mere representation of insolvency, when the estate is in fact confessedly abundantly solvent, is no sufficient reason, in itself alone, why a court of equity should interfere to decree a set-off. It is, in fact, oftentimes a serious inconvenience, and sometimes, no doubt, attended with serious loss, for a party to be compelled to advance a large sum of money, when a portion, or the whole of it, is ulti-

mately to come to him from the very same party now seeking to enforce him to pay money, which, in moral justice and equity, he is not justified in doing. But in legal equity such inconvenience is not regarded, or attempted to be redressed. It is presumed, that where there is an ultimate solvency, the time of payment, if protracted by the mere delay of judicial administration, is not essential. There is, in many respects, an analogy between this case and that of bankruptcy, but there are many important differences. And one is, that what is supposed to be the extreme exception in the one case, *i. e.* that the funds or assets will pay all the debts, is of frequent, if not the more general occurrence in the other case. So that what is, in one case, the exception, may be regarded as the rule in the other. And this, of itself, forms the sufficient reason, why what is regarded as sufficient ground of equitable interference, in the one case, should find no ground whatever to stand upon in the other.

And the other ground, to wit, the insolvency of the principals, it was said in argument, and is true, perhaps, is not in the case. But it was offered to be put in, by way of supplemental bill. And the chancellor refused to allow the party to file any bill in the nature of a supplemental bill, with a view to remedy this defect, upon the ground, that such facts were immaterial to the plaintiff's case. We now consider them the only ground upon which this case can be made to stand at all. If there were no other insuperable objection or obstacle in the plaintiff's progress, (which we shall soon consider,) the Court of Chancery, no doubt, should have allowed him to file his supplemental bill, or one in the nature of a supplemental bill, as was done in the case of *Gillett* v. *Hall*, (13 Conn. R. 426,) which, in this respect, was similar to the case before the court. In that case the supplemental bill was filed during the pendency of the original bill, and before the hearing; and the additional facts thus brought into the case were regarded as essential to the jurisdiction of the Court of Chancery.

If a case of the insolvency, in whole or in part, of the principal in the notes, or the party ultimately liable, in equity, to pay them, was made out; and if also it were shown, that this principal, either in his own name, or the name of others, had a claim against the creditor, which was not, at law, under the control of the other parties to

the notes; and, especially, in case of the death of this principal, and a consequent liability to have this equitable offset absorbed in his estate, and distributed among his general creditors; we should consider that there had arisen a complication of equities, and counter equities, to the adjustment of which, the equitable powers of the Court of Probate were wholly inadequate. And so, within the rule laid down in *Adams* v. *Adams*, (22 Verm. R. 50,) the Court of Chancery would have jurisdiction, in aid of the Probate Court.

And in a case like the one supposed, there is obviously no adequate remedy at law, as we have before intimated.

Some other objections are made to the plaintiff's claim, in a legal point of view, which we must briefly notice, to prevent misapprehension.

We do not suppose that the refusal of the chancellor to allow the party to file a supplemental bill, or one of that kind, before the original bill comes to a hearing, is either a final decree from which, in the first instance, an appeal lies, or that it is a decision which is strictly revisable in this court, being matter of discretion. But that refusal having proceeded, upon special grounds, we should, of course, give the party an opportunity to renew his application, after correcting this misapprehension of the chancellor, if this were the only difficulty in the plaintiff's case. If by this amendment the plaintiff makes a new case, and thus ultimately obtains a decree upon other grounds of equity than any stated in his bill, this would, no doubt, form an important consideration, in fixing the terms of the amendment, or in the final adjustment of the costs, which would scarcely escape the notice of the Court of Chancery.

Whether the general frame of this bill is of a character to enable the party to obtain relief upon this latter ground, is certainly not free from doubt. It certainly is not the usual form of a bill to reach such an object. The usual course is, no doubt, for the sureties to bring the bill in their own names, as orators, joining the creditor and the insolvent principals, as defendants, which would present the parties in their more natural and true position before the court.

The only remaining objection urged by the defendants, which seems to us to afford serious obstacles to the recovery, is the change in the interest of those who bought

out the concern of Wainwright, and to whom the bond was executed.

It was said, by the closing counsel for the plaintiff, that this was regarded, by them, as one invincible obstacle to their recovery at law; and might therefore be regarded as a proper ground of application to a court of equity, for relief in the premises. There may possibly be a good deal of soundness in this proposition. As a general rule, I apprehend, where it becomes necessary to apply to a court of equity to reform a contract, and the Equity Court do so reform the contract, they also retain the case and decree relief. But this is by no means a uniform rule. If the matter is peculiarly appropriate for the consideration of a jury, as in the present case, the party is handed over to the common law courts for his redress, after having his contract set right, or the question of fact is sent to the courts of law to be tried by the jury.

But the objection to the jurisdiction being made to rest upon this ground here is, that the case is not one, which a court of equity would be likely to retain upon this ground alone, it being so peculiarly fit for the consideration of a jury; and further, this ground of relief is not alluded to in the most remote sense, either in the original bill, or the proposed supplement. And we might no doubt, with perfect propriety, here dismiss this question. But as this is a question which the plaintiff must encounter upon the very threshold, if he elects to proceed with his case, we have deemed it important that it should now be disposed of.

The bond is in terms a joint obligation to Smith, Eastman, and Foster, and not to their assigns, successors, or to administrators or executors even. The bond then being executed to the three jointly, and their interest, at the time, being confessedly joint, the action must undoubtedly be in the joint names of the three, so long as all live. But it is claimed by the defendants' counsel, that a recovery could only be had for a breach during the time of the business being carried on by them jointly, *i. e.* between the 9th day of June and the 27th day of September, 1841. And from the examination which we have been able to make, it seems to us that in strictness of law, such only is the extent of Wainwright's obligation, *i. e.* to pay what damages should accrue to the three jointly, from his manufacturing or vending the prescribed articles, within the prohibited district. Nothing else is to be gathered from the terms of

the bond, and nothing else probably was within the express contemplation of the parties at the time. *Myers* v. *Edge* (7 T. R. 248,) is a clear case, to show that contracts of indemnity or bills of credit, addressed to a partnership, cannot be enforced after one of the partners have withdrawn from the concern, or not for credits given after such withdrawal. The principle of this case is of daily application and enforcement in every commercial state, where the common law of England prevails. In the case of *Dana et al.* v. *Gridler et al.* (4 B. & P. 34,) a bond was given to A., B., and C., and others, payable to their successors, for the faithful services of their collector. This society was afterwards incorporated, and the collector made default after such incorporation, and the obligors were held not liable. In *Bosher* v. *Parker* (1 T. R. 287,) a bond to the obligee and his executors, for the faithfulness of a clerk, was held not to make the obligor liable for money received by the clerk and not accounted for, while the business was carried on by the executor. *Strange et al.* v. *Lee* (3 East, 484,) is a strong case in favor of restricting the obligation to the time of the continuance of the joint interest of the obligees. But it is not to be understood, that these cases go so far, as to hold that a bond executed to one, and his successors, and partners, is not to be regarded as binding to the full extent of the terms used, and the intention of the parties. That is expressly declared by Lord Mansfield, in *Barclay* v. *Lucas*, (1 T. R. 291, in note,) and again reported by Ellenborough, C. J., in *Strange* v. *Lee*. The contrary would certainly involve a very glaring absurdity. But a court of law would of course confine the parties to the contract, and not enlarge its obligation, by construction or implication. And a court of equity must do the same, unless applied to to reform the bond, and it would not reform a contract of this character, except upon the most satisfactory grounds.

But the present case seems to us to rest upon somewhat peculiar grounds, in regard to the propriety of affording relief, in favor of those who should carry on the business, although not the same persons named in the bond.

1. It is of a negative character, not to do, or that any other shall do, a particular thing; but a personal undertaking to refrain from doing it. So that this cannot in any sense be said to be an undertaking founded upon the

personal confidence of the particular partners to whom it was executed. If he refrained from the business, it would be indifferent to him to whom the business was left, except so far as his regard for the public good was concerned, and this is not, ordinarily, much of an ingredient in the consideration of contracts.

2. There can be no reasonable doubt both parties expected this bond to enure for the benefit of the business sold out, so long, at least, as it should be continued by the same persons, either jointly or severally, or associated with others. This is sufficiently evidenced by the conduct of both. The obligor repeatedly assenting, and showing by his conduct very obviously his belief, that he was liable upon his bond, as well after as before the change in the partners. And the obligees changing their firm from time to time, without reserve, and still very obviously relying upon the perfect validity of the bond, as a contract binding upon Wainwright.

3. The good will of Wainwright's business was no doubt an important consideration with the obligees, for which they considered that they paid a very considerable sum, and they would not be likely to do an act readily, by which it would become forfeited. Wainwright, too, esteemed this important to himself, and that he was receiving very considerable for it, and after he resumed the business again, as he did in other parts of the state, he was no doubt exceedingly anxious to recover the lost field of trade, which we have no reason to doubt he would immediately have done, had he supposed the obligation of the bond had ceased, by reason of the change in the partners, of which he was fully aware.

Under these circumstances it seems to us, that it would be a virtual fraud upon the obligees to allow Wainwright to escape from the obligation of the bond. Upon this ground alone, if they made proper application to the Court of Chancery to have the bond reformed in this particular, we entertain no doubt it would be the duty of that court to make such a decree upon the present state of the evidence.

1. The result of all, which is that the plaintiff's case, if he elect to proceed with it, must rest mainly, for its choice to be retained in the Court of Chancery, upon the equitable rights of the sureties, growing out of the decease and insolvency of the principals.

2. To bring this into the case, it is requisite to have the case remanded to the Court of Chancery, and there obtain leave, in the discretion of the chancellor, to file a bill in the nature of a supplemental bill.

3. In this supplemental bill it will be necessary also to include an application to the Court of Chancery to reform the bond so as to extend it to the obligees and their associates until the decease of Smith, or, more properly, until the decease of Wainwright.

4. The party must then obtain his verdict in the suit at law, the rule there entered for nonsuit having been already vacated by the chancellor.

The decree of the chancellor is reversed, and the case remanded to the Court of Chancery, to be there disposed of, in accordance with the rules here decided, and others, which may become applicable to the same, in its progress and final determination, in conformity to the principles of equity law.

There are doubtless many points, which were discussed at the bar, not formally noticed here. But those decided must, we think, govern the case. The question, how far this bill ought to be retained for purposes of relief, on the ground that it is properly brought for discovery, upon which there is no doubt considerable conflict in the decisions, does not properly arise here. This bill cannot, in any sense, be fairly regarded as brought for purposes of discovery. Wainwright was dead before the bill was brought, and there was no one who could be expected to make discovery of his transactions, who was not a competent witness at law.

If the question were properly before the court, how far a bill, brought for purposes of discovery, and where there are no other grounds of equitable jurisdiction, could be retained for purposes of relief, I, for one, should very much prefer the English Chancery rule upon this subject, of turning the party over to the appropriate tribunal at law, to founding a jurisdiction in equity, upon so broad a basis as that of seeking discovery, which might be made to absorb the entire business of the common law courts.

It seems to be the constant practice of the Court of Chancery, to retain cases, until a controverted right can be settled by a suit at law; and it is not uncommon to accompany the order, suspending the suit in the Court of Chancery, for this purpose, with an express requisition upon either the plaintiff or defendant, to institute a suit at law, in a given time, and bring the matter to a speedy issue. This is every day's practice in the English Courts of Chancery. *Clowes* v. *Beck*, (7 Eng. Law & Equity R. 42); 20 Law J. Rep. chap. 505

Supreme Court of New York, Albany General Term, February, 1852.

Present, PARKER, Presiding Justice, and WRIGHT and HARRIS, Justices.

JOHN NICOLL, Respondent, *vs.* THE NEW YORK & ERIE RAILROAD COMPANY, Appellant.

Conditions in a deed can only be reserved for the grantor and his heirs. A conveyance made by the grantor to a third person, either before or after breach of the condition, will not carry with it a right to re-enter for condition broken. But this rule in the state of New York does not extend to leases in fee reserving rents, nor to leases for life or years.

A grant to a corporation, purporting on its face to convey a fee, will not, because the corporation was created only for a term of years, be construed to convey only an estate for years.

Corporations, though created for a term of years, are authorized to purchase and hold lands in fee. Though they have only a determinable fee for the purposes of enjoyment, they have a fee simple for the purpose of alienation.

THIS was an action of ejectment tried at the Orange circuit in October, 1848, before Justice Edmonds. The jury found a special verdict on which the Justice presiding gave judgment for the plaintiff. The defendant appealed. It appeared that in 1835, an act of the legislature was passed, incorporating the Hudson and Delaware Railroad Company to construct a road from the village of Newburgh to the Delaware river, and providing that the corporation should within two years commence and within ten years thereafter finish and put in operation a single or double track. By an act passed in 1842, the time for finishing was extended four years. On the 1st July, 1836, one Dederer, being the owner in fee of a farm through which it was proposed to build the road, granted to the company the privilege of surveying and laying out the road through his lands, and granted so much of his lands as might be selected and laid out by the company for the site of their road six rods wide, upon condition that the road should be constructed by the said company within the time prescribed in their act of incorporation. In 1836, the Hudson and Delaware Railroad Company selected and laid out for the site of their said railroad six rods in width through the farm of the said Dederer, said six rods in width being the same premises sought to be recovered by the plaintiff in this cause. The company commenced the construction of said road, but never finished it, and afterwards, in pursuance of an act of the legislature, conveyed by deed for a valuable consideration to the defendants, and their successors, all their property, real and personal, and particularly the right of

way obtained from Dederer through said farm; and the defendants took possession of the same, and proceeded with the construction of the road, but had not finished it when this suit was commenced.

In 1844, the said farm, formerly owned by Dederer as aforesaid, by sundry mesne conveyances, became the property in fee simple of the plaintiff, subject to such right as the Hudson and Delaware Railroad Company then had to any portion thereof for a track of their road.

Thomas McKissock, for plaintiff; *N. Hill, Jr.*, for defendant.

By the Court, PARKER, Presiding Justice. — The grant from Dederer to the Hudson and Delaware Railroad Company was made upon the express condition, that the road should be constructed by the grantee within the time prescribed in the act of incorporation. Whatever estate passed by the grant, was therefore made to depend upon that condition subsequent, on a failure to perform which, the grantor would be at liberty to re-enter. It is alleged that the estate was forfeited by a failure to perform the condition, and that the plaintiff, who claims to be the owner of the land in fee simple by virtue of several mesne conveyances, is entitled to avail himself of the forfeiture.

Conditions in a deed can only be reserved for the grantor and his heirs. A stranger cannot take advantage of the breach of them. (4 Kent, Com. 127.) And the reason for this well settled rule of the common law is, that the estate is not defeated although the condition be broken, until entry by the grantor or his heirs, and "nothing which lies in action, entry or re-entry, can be granted over, in order to discourage maintenances." (Greenleaf's Cruise on Real Property, Vol. 1, tit. 13, ch. 1, § 15.) Before the breach, there is nothing in the grantor to assign; and the right of entry, after breach, is at common law, and by statute incapable of assignment. (1 Smith's Leading Cases, 89, 90; 1 Wend. R. 389; 2 Hill, 491.) When therefore a grant in fee has been made depending upon a condition subsequent, no one can re-enter on breach of the condition, except the grantor or his heirs. A conveyance made by the grantor to a third person, either before or after breach of the condition, will not carry with it a right to re-enter for condition broken. This rule, however, does not extend to leases in fee reserving rents, nor to leases for life or years. (1 Rev. Stat. 747, § 23 – 25.)

The plaintiff's right therefore to maintain an action for a breach of the condition, depends upon the question whether the grant from Dederer to the Hudson and Delaware Railroad Company was a lease for years, or a conveyance in fee. It is found by the special verdict, that Dederer, on the first day of July, 1836, being the owner in fee simple of a certain farm or tract of land situate, &c., by his deed, dated and executed on the last-named day and year, for and in consideration of the benefits and advantages to him of the railroad proposed to be made by the Hudson and Delaware Railroad Company, and of one dollar to him in hand paid by such company, granted to such company the privilege, by their agents and engineers, of surveying and laying out through his said farm or tract of land the route and site of their said road; and also for the same consideration, thereby granted, bargained, sold and conveyed unto the Hudson and Delaware Railroad Company, "and their successors," so much of his aforesaid farm or tract of land as might be selected and laid out by the Hudson and Delaware Railroad Company for the site of their said road, six rods in width through his said farm or tract of land; provided always, and such grant was made upon the express condition, that the said railroad should be constructed by the Hudson and Delaware Railroad Company within the times prescribed in the Act of incorporation; and the jurors further found that the route was duly selected, and laid out six rods wide, and that such land, so selected, was the same land claimed in the declaration. The grant upon its face purports to convey a fee in express terms. Being made to a corporation "and their successors," it would be held to convey a fee even according to the most strict requirements of the common law.

But it is argued on the part of the plaintiff, that the grant must be construed to convey only an estate for years, because the corporation to which the grant was made, was created only for the term of fifty years. (Laws of 1835, p. 113, § 1.) The case of *The State* v. *Rives*, (5 Iredell, Law R. 297,) cited by the plaintiff's counsel is inapplicable. That was an indictment for obstructing a highway in tearing up the rails of the Portsmouth and Roanoke Railroad Company. The act incorporating the company declared that after the assessment and payment of damages for the land to be used for the construction of the road, the company might enter upon the said land, &c., and hold the said land to their

own use and benefit, for the purpose of preserving and keeping said railroad during the continuance of their corporate existence, (sixty years); and in all things to have the same power and authority over said land, so laid off, during their existence as a corporation under the law of the state, as though they owned the fee simple therein. The question presented was, Whether the company took any of the estate in the land liable to execution, under which it had been sold to the defendant. It was held that the corporation, after assessment and payment of damages, became the tenant of the land, as the owner of the legal estate for the term of sixty years, subject to the earlier determination of the corporation for any cause. The court said that most of the railroad charters of that state gave an estate in fee, but under the peculiar phraseology of the act, they held the estate in that case to be only an estate for years. In that case there had been no grant whatever to the company. The question presented was, What interest did that statute give to the company, where lands were compulsorily taken? In *Hooker* v. *Turnpike Co.* (12 Wend. Rep. 371,) and *The People* v. *White*, decided by this court, and not yet reported, the question of title is discussed where the proceedings are *in invitum*.

But the question here presented is, Whether, where the grant in express words conveys a fee, it shall be adjudged to be only an estate for years, because the grantee had a corporate existence given by its charter for only fifty years. At common law the rule was, that if the grantee only was named in the deed, it conveyed only an estate for life. Words of limitation were necessary, such as "heirs" or "successors," if it was intended to convey a fee. But there were cases in which a fee would be implied without words of inheritance or succession; as where land was conveyed to a corporation aggregate, (Viner's Ab. Estate, L. 3,) or to a mayor or commonalty, (Ib. 3,) a fee passed without the word "successors" because the grantees were perpetual. The grantee named having a perpetual existence, the estate could not be enlarged by words of succession. In such case the law implied an intention to convey a fee. But it is also a well settled rule of law, that "No implication shall be allowed against an express estate, limited by express words." (Viner, Ab. Implication, A. 5; 1 Salk. 236.) And in the case we are considering, there is no room for implication, for the estate intended to be conveyed is as plainly ex-

pressed in the grant, as if it had been called "an estate in fee." We may imply in the absence of express words, but we cannot imply against them.

I suppose we are in all cases to ascertain what estate was conveyed, by reference to the grant itself. It is the only legitimate mode of ascertaining the intent of the parties, and must be conclusive in all cases, where the grantor is capable of conveying and the grantee of taking. In most cases, the language of the conveyance will be conclusive on the party conveying and those claiming under him, though only a lesser estate actually pass by the conveyance. (1 R. S. 739, § 143, 144.)

Indeed the statute seems now to be conclusive on this point. (1 R. S. 748, § 1.) After declaring that the term "heirs" or other words of inheritance shall not be requisite to create or convey an estate in fee, it provides that every grant or devise of real estate thereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in such grant. It was found by the jury that Dederer was seized in fee simple; his whole estate must have passed by his conveyance, which purported to convey a fee, as we are not permitted under the statute last cited to look for implication beyond the terms of the grant. The kind of estate conveyed by a deed cannot be ascertained by reference to the length of time the grantee has the ability to enjoy it. If so, every estate conveyed to an individual by deed, in terms plainly expressing a fee, would be but a life estate, because the grantee's term of enjoyment must necessarily be limited to his life.

There can be no doubt of the power of the Hudson and Delaware Railroad Company to purchase and hold lands in fee. Its charter (Laws of 1835, page 113, § 9) expressly conferred the power to purchase and hold all the real estate which might be necessary and convenient, in accomplishing the objects for which the act of incorporation was granted. This did not mean that they should take only an estate for years, but it authorized them to purchase in fee. It is under such provisions that land is purchased by a railroad company on which to make expensive erections for depots and other purposes, and it is under a like provision that banks, whose charters are generally of limited duration, purchase and hold land for the erection of a banking-house.

Corporations limited in their duration, may not only purchase and hold in fee, but they may sell such real estate when they shall find it no longer necessary or convenient. *The People* v. *Munson*, (5 Denio, 389;) 2 Kent, 281; Preston on Estates, 250. Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation, the *reverter* is to the original grantor or his heirs, but the corporation may defeat the possibility of a *reverter*, by an alienation in fee. 2 Preston on Estates, 50; 5 Denio, 389, 401; *Bingham* v. *Weiderwax*, (1 Comst. R. 509); Angell & Ames on Corp. 128, 129; 2 Kent, Com. 282. The statute (1 R. S. 599, § 1,) gives to every corporation the power to hold, purchase and convey such real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited by its charter. This is clearly a power to hold, purchase and convey in fee. (2 Kent, Com. 281.)

The conveyance from Dederer to the Hudson and Delaware Railroad Company carried therefore an estate in fee. That being the case, no person except Dederer or his heirs has the right to inquire whether the estate has been forfeited by a failure to keep the condition subsequent. It follows that the plaintiff cannot maintain this action, and it is therefore unnecessary to examine the other questions raised and discussed on the argument.

The judgment rendered at special term must be reversed, and judgment given for the defendant.

Abstracts of Recent American Decisions.

New York Court of Appeals, April 16, 1852.

[From the New York Evening Post.]

Appeal. An order of the court below refusing to stay proceedings until the determination of another controversy involving the same question is not a proper subject of review in this court. — *James* v. *Chalmers*.

Appeal from Surrogate. On an appeal from the surrogate in the matter of the final settlement of an executor's accounts, it not appearing that his judgment was not warranted by the facts of the case, it will not be disturbed on appeal, even though the judges of the appellate court might have arrived at a different conclusion on the facts. — *Campbell, Ex'r, &c.* v. *Campbell*.

The costs of the proceedings below, though in a measure in the discretion of the surrogate, are nevertheless, under our statute, the subject of an appeal. — *Ib.*

But it not appearing that any error in law has been committed in that

respect, this court will not review the exercise of that discretion. Opinions by JEWETT and GRIDLEY, JJ. — *Ib.*

Appeal from Referees. An appeal from a judgment on a report of referees, was dismissed with costs, there not being in the record any statement of facts as found by the court below, nor any bill of exceptions, but simply a case setting forth all the evidence given on the trial. — *Colie* v. *Brown.*

A refusal of a referee to adjourn the hearing before him, where it is a matter resting in his discretion, will not be reviewed on appeal. — *Carpenter* v. *Haynes.*

The finding of a referee on the questions, whether the plaintiff had performed his contract, and whether performance had been waived, will not be reviewed in this court on appeal from the judgment of the Supreme Court affirming the report of the referee, because they are questions of fact only. — *Newton* v. *Harris.*

Appeal, Payment of Judgment when no Bar to. A party against whom a judgment has been rendered in the court below, is not prevented from appealing by the fact that he has paid the judgment, unless such payment was by way of compromise and agreement to settle the controversy. — *Wells* v. *Danforth.*

Appeal, Time of. The time for appealing to this court begins to run from the time the decree appealed from shall be entered, and not from the time of its enrollment. — *Woollen Man. Co.* v. *Townsend.*

Appeals, Provisions of the Code as to. The provision of the amended code of 1851, allowing appeals to this court from orders granting a new trial, does not include new trials upon a case made involving questions of fact, but only where questions of law are involved in such order. Opinion by GRIDLEY, J. — *Moore* v. *Westervelt.*

The provision of the code, allowing an appeal to this court from a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, does not include an order granting or refusing a provisional remedy, nor an order vacating or refusing to vacate such provisional remedy. — *Ib.*

The provisional remedies specified in the code are not the special proceedings therein mentioned. — *Genin et al.* v. *Tompkins.*

Assignment — Notice. An assignment of an unexecuted contract for services to be performed and goods to be delivered, will be recognised in equity as transferring the interest in it to the assignee, and a suit in his name to enforce payment under it will be sustained. — *Field* v. *Mayor, &c. of New York.*

Where several distinct parts of such an agreement have been assigned to different persons, the remedy is peculiarly in equity, for only there could all the parties in interest be brought in, and because at law no one of the several assignees could be obliged to enforce the contract for the benefit of the others — *Ib.*

Notice to the comptroller of the city of New York is notice to the corporation, because he is its financial officer, and is the head of the department to which the claim properly attaches, and by whom the contract is to be performed on the part of the corporation. Opinion by WELLES, J. — *Ib.*

Boundary Lines. A division line between two farms, acquiesced in for forty years, and possession held by both parties agreeable to it, for that period of time, is conclusive on both parties, and cannot be disturbed. — *Watkins* v. *Hewitt.*

An agreement to have the true line run out, and the employment of a surveyor to do so, does not affect the title established by such acquiescence, where, before the line is run out and an award made as to its location, one

of the parties withdrew his consent thereto, and refused to have the old line disturbed. — *Ib.*

Certiorari. — Upon the certiorari provided by 2 Rev. Stat. 49, § 47, concerning general provisions in cases of insolvency, the Supreme Court has power to examine and correct any erroneous decision of the officer *a quo*, upon a question of law, and the power of that court is not limited to the mere question of the jurisdiction of the inferior tribunal and the regularity of the proceedings before him. Opinions by GARDINER, EDMONDS, and GRIDLEY, JJ. — *Morewood* v. *Hollister*.

Constitutional Law — County Courts. The enactments of the Judiciary Act conferring jurisdiction in civil suits on the county courts are constitutional. The term "special cases," as used in the constitution in reference to the jurisdiction of those courts, does not mean only those proceedings which, under our statutes, have obtained a technical name of "special proceeding," but such cases as the legislature may specify, contradistinguished from general jurisdiction.

But the record not showing that the county court had jurisdiction of the person of the defendants by reason of their residence in the county, for that reason, judgment should be rendered for defendants, with costs of the court below. Opinions by JOHNSON, WELLES, and EDMONDS, JJ. — *Frees* v. *Ford*.

CONTRACT — *Contract in Writing may be varied by Parol.* Where a contract for the sale of land stipulated that the bargainee should not cut any timber upon the land without the written consent of the bargainer, it is competent for the parties to change the contract by parol, and a parol license to cut timber would be good, and would convey to the bargainee the title to the timber cut pursuant to such permission. Opinions by WELLES, JEWETT, GRIDLEY, and EDMONDS, JJ. — *Pierpont* v. *Barnard*.

Time of Performance. Where no time is fixed in an agreement for the performance of a contract, it must be executed in a reasonable time; and though the parties verbally fixed a day therefor, an omission to perform on that day will not vitiate the contract, if the delay was reasonable and the party was ready to perform in a reasonable time. — *Bliss* v. *Sweet et al.*

Specific Performance. In an action for specific performance, it is no defence that the plaintiff has contracted to sell the premises to a third person, and has agreed, without the concurrence of the defendant to obtain a conveyance direct from the defendant to the plaintiff's vendee. — *Pew* v. *Pew*.

And in such case, it is competent for the plaintiff and his vendee to alter their contract, and provide for the deeds being given to the plaintiff, and by him to his vendee, although the defendant has acted upon the faith of the original contract, where he has done so without the concurrence or connivance of the plaintiff. Opinions by WELLES and EDMONDS, JJ. — *Ib.*

In a bill for specific performance, where the plaintiff is entitled to relief prayed for, and the defendant is unable to convey according to the agreement, by reason of his not having any title to the land he contracted to sell, the relief granted will be that the vendor return the purchase-money with interest. — *Gibson* v. *Pennington*.

The objection that the vendor had not a title at the time of making the contract, and that that was then known to the purchaser, though it might be a good defence, cannot be available where it is not set up in the answer. — *Ib.*

Where one of two innocent persons must suffer by the misconduct of a third, the loss must fall upon him who by placing confidence has caused the third person to commit the wrong complained of. Opinions by EDMONDS, GARDINER, and GRIDLEY, JJ. — *Ib.*

Though specific performance in equity is a matter resting in discretion, it is so where there are circumstances of suspicion attending the transaction, not amounting to fraud, or where the bargain, though not contrary to law, is unconscientious; but where the contract is fair and founded on a valuable consideration, and the complainant has shown an intention, in good faith, to execute it, a specific performance is as much a matter of right as the enforcement of the execution of a trust. Opinions by GARDINER and WATSON, JJ. — *Bliss* v. *Sweet et al.*

Deed — Correction of Error in the Description. On a complaint filed to correct a mistake in a deed in the description of the premises conveyed, where such description was taken from a map which both parties supposed to be in conformity with a previous view, the mistake will be corrected. Opinions by GARDINER and WELLES, JJ. — *Johnson* v. *Taber.*

Devise — Undue Influence. On a devise apparently for life only, with remainder to the devisee's children, but in reality in fee in the devisee, where, in infirm health and expecting the speedy approach of death, and in ignorance of her real rights under the will, the devisee conveyed all her real estate to her brothers, at their instigation, and who had always conducted her business for her, and thereby disinherited her own children, it was held that the conveyance was obtained from her by undue influence, and was void. Opinions by GRIDLEY, J., and RUGGLES, Ch. J. — *Sears* v. *Shafer.*

The devise in the testator's will of his "unsold Commentaries on hand," does not pass the interest in an edition not printed or published at the testator's death, but only contracted and partly in type at that time, but such edition passes under a clause in the will expressly devising to the respondent, William Kent, the testator's Commentaries, with the right of renewal, and all other rights and privileges appertaining to the copyright. Opinion by JEWETT, J. — *Hone* v. *Kent.*

EVIDENCE. Where on the trial of an action of ejectment against the defendants who claimed title under certain special proceedings pursuant to the statutes providing for the appraisal, before a county judge, of private property taken for the use of the road, the record of those proceedings is given in evidence, it is not conclusive against the other party, and evidence tending to show a want of jurisdiction was improperly excluded. — *Adams* v. *S. & W. Railroad Co.*

And though the offer of the evidence may have been too broad, that is not available on review, when the ground of the exclusion of it rested and was put solely upon the conclusiveness of the record. Opinions by GRIDLEY, J., and RUGGLES, Ch. J. — *Ib.*

Where, on summary proceedings by a landlord to remove a tenant on the ground of non-payment of rent, the question is raised and passed upon whether there was rent in arrear, it is determined as between those parties, and in an action afterwards brought by the landlord to recover the identical rent, the adjudication on those points in the summary proceedings is conclusive, and is a bar to any recovery of such rent, on the ground that the question has been already adjusted by a competent tribunal, and is conclusive upon the parties to it. Opinions by RUGGLES, Ch. J., and EDMONDS, J. — *White* v. *Coatsworth.*

A former holder of a note, who has transferred it without recourse or guaranty, is a competent witness for the plaintiff, but the declarations of the former holder, made while he was such holder, are not competent evidence against the present owner, to whom it has been transferred in good faith. Opinions by WATSON, WELLES, and JEWETT, JJ. — *Ib.*

In a suit against the indorser of a note, by a holder to whom it was transferred after maturity, it is competent evidence for the defendant to

introduce the pass-book of the maker with the bank, to show payment of the note by him, and also the books of the bank for the same purpose; such evidence not being merely the declarations of the holder of a note, while in his possession, but acts of parties competent to discharge it, showing its discharge. Opinion by RUGGLES, Ch. J. — *Germain* v. *Dennison.*

EXCEPTIONS. An exception to the charge of the judge in the form of an exception "to the whole of the charge as given, and to each part of it," is too broad, if there is any part of the charge correct. An exception in that form can be available only, when every part of the charge is wrong.— *Jones* v. *Osgood.*

It is the province of an exception to the ruling of a judge on the trial, to call his attention directly to the objectionable part, so that he may, if there be error, correct it at once, and direct the attention of the other party to errors which may be supplied or waived by him on trial. — *Ib.*

An exception to a "whole charge" is too broad, unless it is all wrong, and the addition of the words "and each part of it," makes no difference. Opinions by GRIDLEY and JOHNSON, JJ. — *Ib.*

An exception to a whole charge is too broad to be of any avail, where any part of it is right; and the objection cannot be taken in this court, that the pleadings showed the facts to be different from what they appeared to be on trial, unless the attention of the court was called on the trial to the pleadings. Opinion by GRIDLEY, J. — *Watkins* v. *Hewitt.*

Where an exception is so vague, that this court cannot determine whether it is to the award of judgment or to the manner of giving it, it will be disregarded as too general: the office of an exception being to enable the judge to know and correct, if he desires, his ruling on the precise point complained of. Opinions by EDMONDS, J., and RUGGLES, Ch. J. — *Sands* v. *Church et al.*

Executor and Administrator. Where a note against a deceased person had been transferred to the plaintiffs during his lifetime and was held by them, during the administration on his estate, and the administrator without exacting the production of the note, pays the amount thereof to the original payee, and on the final distribution before the surrogate presents it as a claim of his own, and has it allowed and paid to him as a creditor, he is liable for money had and received to the real holder of the note. — *Bank of Poughkeepsie* v. *Hasbrouck.*

And the decree of the surrogate on such distribution, though made after due publication of notice to creditors, is not conclusive as to the ownership of the debt between the real owner and him who has thus illegally obtained payment of them, but that question may be raised and determined in another court. Opinions by WELLS and JOHNSON, JJ. — *Ib.*

Fraudulent Conveyance — Receiver. On a bill filed against a debtor and his assignees under a voluntary assignment to set the same aside as fraudulent, an assignment to a receiver by order of the court conveys all the estate and title of the debtor, and not merely a power to take charge of and preserve the lands of which the debtor was seized at the time of the assignment, and consequently had no estate or interest in the land on which a judgment subsequently recovered could attach. — *Chatauque Co. Bank* v. *White.*

In such case the court have power to decree a sale of the land, by the receiver in that suit, and it is not necessary that the creditor should be driven to his execution at law, or that he should first procure an execution to be returned unsatisfied. Opinion by GARDINER, J. — *Ib.*

Guardian and Ward — Receipt. A receipt given by a guardian, specifying that he has received a certain sum as money belonging to his ward's estate, is explainable by parol evidence. And where it appeared that what

was thus received by the guardian was not money but land contracts, nominally valued at the sum mentioned in the receipt, the guardian was held liable only for their actual and not for their nominal value. Opinions by WATSON and GARDINER, JJ. — *White* v. *Parker*.

Indictment, what Defects in, cured by Verdict — Judgment — Verdict — Evidence. A caption to an indictment is no part of it, and a mistake in it is no error so long as it shows that the court trying the cause had jurisdiction. — *Niles* v. *The People*.

It is not error in the judgment, to award that the prisoner be imprisoned at hard labor, for though the statute designates imprisonment as the punishment, it also affixes hard labor as a consequence and part of the punishment, and it is not error so to state in the judgment. — *Ib.*

Where it has been found by the verdict that the false pretences charged were such as were likely to deceive a person of ordinary sagacity, a defective mode of stating them in the indictment will be thereby cured where they appear by implication, even if they were so stated as to be bad on demurrer. — *Ib.*

Evidence of similar offences committed at other times is in such case competent to show the criminal intention — *Ib.*

Defects in criminal cases as well as civil, merely in matters of form, not affecting the merits, are cured by the verdict. Opinion by GRIDLEY, J. — *Ib.*

Legislature, Authority of. The legislature have no power to authorize or grant a conveyance of one man's property, without his consent, to another, on pretence of a sale of it, except for a public use. — *Powers et al., Trustees, &c.* v. *Bergen*.

Therefore, an act of the legislature, authorizing trustees, who under a valid will are seized of the title of an estate in lands, which they held in trust for one person for life, with remainder over to others, to sell the whole estate, the remainder as well as the life interest, without the consent of those entitled to remainder over, is void. Opinions by JEWETT and JOHNSON, JJ. — *Ib.*

Payments, Appropriations of. Where the holder of a note had left it for collection with a city banker, who had transmitted it to his correspondent in the country for the same purpose, by whom it was collected, without notice as to the true ownership of the note, the country correspondent had no right to retain the avails in payment of a precedent debt owing to him from the city banker as against the true owner, where no advance had been made by him on the strength of it. Opinions by RUGGLES, Ch. J., and JOHNSON, J. — *Warner* v. *Lee et al.*

Pleading — New Matter. In an action on a promissory note, an answer averring payment is not pleading new matter, which it is necessary to controvert, for it is merely taking issue on a material averment of a breach of the contract. — *Van Gieson* v. *Van Gieson et al.*

An issue is joined when there is a direct affirmation and denial of the fact in dispute, and it makes no difference whether the affirmative or the negative is first averred. — *Ib.*

In an action on a promissory note, the plaintiff must prove, 1, the identity of the note; 2, his interest in it; 3, that defendant is a party to it; and 4, that defendant has not performed his contract. The possession of the note by the plaintiff is *primâ facie* evidence that it is not paid, and an averment of payment is not therefore new matter, but is merely in denial of a material allegation in the complaint. Opinions by JOHNSON and EDMONDS, JJ. — *Ib.*

Sale. Where on the sale of personal property it is agreed that the vendee, if on trial he should not find the article to answer his purpose, might within a certain time re-convey it to the vendor, and receive back the

price he paid, the vendee within the specified time executed a re-conveyance, which the vendor accepted, such acceptance is a waiver by the vendor of the condition on which the right of recovery was founded. — *Young* v. *Mudge et al.*

And the articles in such reconveyance bind the vendor, where he accepted the paper without any objection as to their accuracy, especially, where in the complaint it is averred that those recitals were true, and a demurrer is interposed, which admits the truth of the averment. Opinions by WATSON and JEWETT, JJ. — *Ib.*

Set-off. A debtor to a bankrupt, who, after the presentation of the petition in the bankruptcy, purchases a demand against the bankrupt, cannot, in an action brought against him by the assignee in bankruptcy, set off the same, not so much because of the relation of the right of the assignee back to the act of bankruptcy, as because under the statute of set-off the bankrupt and the debtor were never indebted to each other, and had not demands against each other arising on contracts. — *Smith* v. *Brinkerhoff.*

And because, to allow a set-off under such circumstances, would be fraud upon the equality designed by the bankrupt law. Opinions by EDMONDS and GARDINER, JJ. — *Ib.*

Surrogate. The judgment of the surrogate, admitting a will to probate, is conclusive upon the parties to the proceeding, and those claiming under them, and cannot be questioned in a collateral action. Opinions by EDMONDS and GARDINER, JJ. — *Vanderpoel* v. *Van Valkenburgh.*

Trover — Conversion — Damages. Where a party had sold a quantity of lumber, but it was agreed that the title should remain in him until he was paid and it was shipped to market, a bill of lading was taken in his name, and the consignee was directed to sell it as his property, he can maintain trover for the lumber against the consignee who sold it and passed it to the credit of the vendee in his account with him. — *Covill* v. *Hill et al.*

In such case, it was not error for the judge on the trial to charge the jury that the foregoing facts, together with a demand and refusal to pay over the avails, were evidence of a conversion by the consignees. — *Ib.*

The amount to be recovered in such case is the value of the property at the place where it had been sold, deducting the expenses which had been necessarily paid by the consignee. Opinions by GRIDLEY and GARDINER, JJ. — *Ib.*

Usury — Waiver. Where mortgaged premises are conveyed subject to a mortgage, and the grantee takes them by a deed expressly declaring them liable to the payment thereof, such grantee cannot, in a suit to foreclose the mortgage, set up a defence of usury as between the mortgagor and mortgagee, the mortgagor having suffered judgment thereon to be taken against him, and having thereby as well as by the terms of his grant waived the defence and bound his grantee by the waiver. — *Sands* v. *Church.*

Witness. A witness can be contradicted by proof, that on another occasion he had given a different statement, where he has first been examined on the subject, and his attention called to the time and place and circumstances under which it is alleged he has made such statement, and where such other statement is not collateral. Opinions by WATSON, J., and RUGGLES, Ch. J. — *Newton* v. *Harris.*

Supreme Court of New York — Ulster Special Term, April, 1851.

Assignment by Insolvent for the Benefit of Creditors. An assignment of his estate by an insolvent debtor, for the benefit of creditors, which confers

upon the assignees an express authority to sell on credit, is void. Per HARRIS, J. — *Whitney & others* v. *Krows & others.*

But a provision authorizing the assignees "to sell and dispose of the property upon such terms and conditions as, in their judgment, may appear best," &c., and "to convert the same into money," will not be construed as authorizing them to sell on credit. — *Ib.*

The fair construction of such a provision is, that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money. — *Ib.*

Nor will it render an assignment void, to insert in it a provision authorizing the assignees to effect an insurance upon a portion of the assigned property, and to keep good an insurance already existing upon another portion, so long as in their judgment it shall be necessary. — *Ib.*

Neither will an assignment be vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the interest on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so. — *Ib.*

Limitations, Statute of, against an Executor. An executor to whom the testator had given full power to sell, dispose of, lease, or mortgage, any or all of his real estate, for the payment of debts and legacies, and for the division of the balance among the devisees named in the will, by his acts held himself out to the devisees as engaged in winding up the estate and discharging claims that would be prior to theirs. *Held*, that while he was doing or professing to do this, the statute of limitations could not run against them, who had no rights as against him, until those prior claims were paid. By MITCHELL, J. — *Carroll* v. *Carroll, Ex'r, &c.*

Held, also, that every new act of his, in raising money as executor out of the estate, to pay the debts of the testator, was as effectual an acknowledgment of his continuous acting as executor, and his continued and unbroken liability as executor, as if in each case he had promised each devisee or legatee that he would account as executor. — *Ib.*

If lands are sold by en executor, under a power for that purpose, contained in a will, to pay debts, a devisee who has an interest in the residue has a right to an account from the executor, of what the debts of the testator were, and of what amount of personal estate has been received by the executor to pay those debts; that he may know whether such sales are valid; and if valid, whether he is entitled to any, and if so, how much of the money raised thereby. — *Ib.*

Married Woman — Trustee — Liability of Heirs and Devisees — Practice. Although a woman be married, and have a separate estate and a trustee, yet when the trustee puts before her eyes clear and express notice of his doings, the same inferences must be drawn as to her reading and understanding the notice, as would arise in the case of an unmarried woman or a man. By MITCHELL, J. — *Stuart* v. *Kissam.*

Although good faith must be strictly enforced against a trustee, and he may not be allowed to deal with the trust property to his own benefit, yet where the trustee had substituted a new security by way of mortgage, in the place of a former mortgage, upon certain property, but not including the whole, which was covered by the former mortgage; and there was no gain intended to be made by the trustee, and, so far as appeared, the new security would have been deemed sufficient at that time, and it was accepted by the *cestui que trust*, who was competent to judge of its value, the transaction was held valid. — *Ib.*

Whether a different rule would apply, if it had been shown that there was a fraudulent combination between the trustee and the other parties to

the transaction, to cancel the first mortgage for their benefit — it is not necessary to inquire where there is no proof of actual fraud. — *Ib.*

Heirs may be made liable for the debt of their ancestor, but not unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings before the surrogate and at law, the creditor has been unable to collect such debt from the executors, or from the next of kin, or legatees. Thus a suit at law is an essential preliminary to a right to sue the heirs. The heirs are to be sued jointly in equity. — *Ib.*

Devisees may also be liable for the debts of the devisor; but not unless it appears that the personal assets and the real estate descended were insufficient to discharge the debt; or that after due proceedings before the surrogate and at law, the creditor has been unable to recover the debt. — *Ib.*

It makes no difference that the same persons are entitled to the whole estate, real and personal. The statute makes no exception, but requires the creditor, in all cases, to seek satisfaction from the personal property before he resorts to the real estate in the hands of the heir. — *Ib.*

In a suit of this kind, whether at law or in equity, all the heirs must be joined. The heirs and personal representatives cannot be joined in a suit. — *Ib.*

Partnership — Promissory Note — Referee. Where a promissory note, belonging to a partnership, is transferred or paid over by an individual member thereof, in satisfaction of his own private debt, it is incumbent on the plaintiffs, in a suit brought upon such note, to show the assent of the other partner, in order to bind him; and such knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances. By MITCHELL, J. *Kemeys & Sampson* v. *Richards & others.*

The question of assent is a question of fact, peculiarly within the province of a referee, with which the court ought not to interfere, if it be merely doubtful whether he was correct in his conclusion on that subject or not. — *Ib.*

The report of a referee may be sustained, although he improperly admits some testimony, if, on rejecting that, enough remains to sustain his report. — *Ib.*

New York Common Pleas, July, 1852.

Apprentice — Right to his Services, on attaining his Majority. Where a claim was made by plaintiff to recover of the defendant compensation for the time and services of an apprentice bound to the former by indenture duly executed, but employed by the latter, notwithstanding notice of the apprenticeship had been given him. It was *held*, that it was competent for the defendant to show that the age recited in the indentures was incorrect, and that the person bound, was of full age at the time of the services for which such was brought, and was therefore entitled to his discharge. The party himself has a right to show, after he arrives at age, that the age stated in the indentures is incorrect, and to claim his discharge. The same may also be shown by a person sued by his master for his services. — *Drew* v. *Peckwell.*

Assignment of Claim — When valid. An assignment of an interest in a claim by one partner to his copartner is valid, although no consideration was paid for such assignment. And where an action was commenced for the recovery of the claim by both partners after the assignment had been made, it was *held*, that the assignment was a good defence. — *Clark et al.* v. *Downing.*

Contract — Quantum meruit. Where on the trial of an action brought to recover the value of merchandise sold by plaintiff to defendant, positive

testimony was given of the price at which they were sold. *Held*, that testimony as to the market value of the goods was incompetent, and the judgment of the court below, which was founded upon the estimate of witnesses, of such market value, was erroneous, and should therefore be reversed. — *Bassford* v. *Shields.*

Execution, Supplementary Proceedings after. Where a judgment is recovered in a justice's court, a transcript filed, and supplementary proceedings taken under the execution, the merits of the original action cannot be inquired into, nor any objection be taken to the jurisdicton of the justice, which does not appear on the face of the proceedings. — *O'Neil* v. *Martin.*

Superior Court of New York City, July, 1852.

Charter Party — Construction of. Where by the terms of a charter party, the owners were to keep the vessel "tight, staunch, well fitted, tackled and provided with every requisite, and with men and provisions necessary for the voyage" on which she was chartered, and the owners put all the room in the vessel except the cabin and necessary room for the men and provisions, at the disposal of the charterer, who agreed to hire and freight the vessel. *Held*, that the effect of the instrument was, to hire the vessel to the charterer for a stipulated sum, in lieu of freight at specified rates on the goods shipped, the owners appointing the master and controlling throughout the furnishing and navigation of the vessel. *Held* also, that the owners continued in possession of the vessel as owners during the voyage for which she was chartered, and had a lien for their charter freight upon all merchandise transported in her to the extent of the freight payable by the shippers of such merchandise.—*Parensted* v. *Holmes.*

This rule would not apply, provided the payment of the freight by the charter is postponed in terms beyond the delivering of the cargo. Opinion by Sanford, J. — *Ib.*

Common Carriers, Liability of — Notice. Common carriers have a right to restrict their liability by an express contract, and a receipt given in the following form, was *held*, to restrict their liability, and to be valid in law. "New York, ———, 181–. Received of ——, numbered and marked as in the margin, which we promise to forward to ——, and deliver to —— or agent, (loss by fire, water, breakage, leakage, and perils of the seas excepted):" *held*, that the just interpretation of such an agreement, was, not to exempt the carriers from *all* losses, but that they still remained liable for such as might result from their wrongful acts or the want of due care and diligence of themselves or their agents and servants.—*Stoddard* v. *Long Island R. R. Co.*

And where the goods in question were given by the plaintiff not immediately to the defendants, but to an express company using and employing the cars upon their road, *held*, that plaintiffs were bound by the special agreement, and consequently were not entitled to recover, unless an action could have been maintained by them against the express company, in their own names. Opinion by Duer, J. — *Ib.*

Evidence, Parol — Bought and Sold Note — Usage. A general usage of trade offered to control or contradict settled rules of law, is inadmissible in evidence. Evidence of the meaning of words of art, of terms and phrases peculiar to mercantile pursuits, and of the subjects of commerce, however, is proper and competent.—*Morewood* v. *Battelle.*

In an action of assumpsit brought by plaintiffs to recover damages for the refusal of defendants to complete an alleged purchase of about 3000 gallons of linseed oil, there was a variance between the bought and sold notes offered in evidence for the purpose of proving the alleged

contract which had been effected through the agency of a broker. The bought note described the subject of the contract, as "Linseed oil to arrive by ship Sarah from Hull." The sold note described it as "Engl. linseed oil to arrive, &c." The variance was in the descriptive word "Engl." The proof was abundant and uncontradicted, that "linseed oil" sold to arrive from England meant English linseed oil. *Held*, that such proof was admissible; that it tended to show what was the subject-matter of the contract, and not to vary or contradict its language. It merely explained to the court and jury what the language meant in which the parties described the subject of purchase and sale. The evidence obviated the apparent variance between the bought and sold note, and rendered the right of recovery in the plaintiff perfect. — *Ib.*

Held, also, that it was incompetent for defendants, by way of defence, to show a mercantile usage, that where goods are bought and sold to arrive, in case the merchandise upon its arrival was insufficient to meet all the contracts, in consequence of a loss on the voyage, the purchaser under the first contract was entitled to have his contract first filled; and that, in the present case, evidence was inadmissible to show that prior contracts for the sale of the oil had been made by the plaintiffs sufficient to exhaust the quantity which actually arrived. Opinion by SANFORD, J. — *Ib.*

Infant, Liability of — How affected by Representations of Majority. In an action brought against a minor to recover the value of merchandise sold to him by the plaintiffs, *held*, that the defendant was not estopped from setting up the plea of infancy, by reason of his having represented himself at the time of the purchase to be of full age; such a representation is no more fraudulent, than the suppression of the fact of his infancy would have been at the time of the purchase, and his mere silence as to his infancy has never been held to estop him from pleading it. — *Brown* v. *McCune*.

An action on the case cannot be maintained against an infant for a fraudulent representation that he was of full age. Opinion by SANFORD, J. — *Ib.*

Replevin — When demand is necessary before Suit brought. Where goods are in the possession of an innocent bailee, who neither knew nor had reason to believe that they had been wrongfully and fraudulently obtained by the person from whom he received them, a demand is necessary before a suit can be brought for their recovery. But no demand is necessary where they are in the possession of holders with notice who have paid no value. — *Phillips* v. *Pringle*.

The form of the action of replevin, being in *detinet* only, is not an admission that the possession was lawfully acquired by the defendant. — *Ib.*

Where a party obtained possession of a quantity of merchandise by fraud from plaintiff, so that the sale as between him and plaintiff was palpably void, and the goods were subsequently leased to defendant, it was *held*, that the defendant was bound to show his title, which he having claimed to do by proof of his acceptance and payment of certain drafts, it was then held to be a question of fact for the jury, whether the defendant accepted the drafts in good faith upon the credit of the goods, without any notice of the fraudulent manner in which they had been obtained from plaintiff, and without notice or knowledge of any facts or circumstances which ought to have put him upon his guard, as a man of ordinary prudence. The burden of proof, however, after the defendant had shown the payment of value, no longer rested upon him. — *Ib.*

The English rule upon the question of *mala fides* in the purchase of goods, is not the doctrine of the American courts. Opinion by DUER, J. — *Ib.*

Ships and Shipping — Ownership of Vessels — Lien for Labor and Materials. The fact that a vessel is built by A. is presumptive evidence that he

is the owner. Evidence that it was built by him for an association under a contract, does not go far enough to rebut the presumption thus established. The contract itself will determine the ownership. — *Wright* v. *Phillips.*

A lien may be created upon an incomplete or unfinished vessel. It is not essential that it be complete, ready for use and capable of sailing from the port, in order to be a vessel within the meaning of law. In the ordinary use of the word, the term ship, or vessel, is applied, and properly, to the structure or frame of a ship or vessel. — *Ib.*

The whole theory of a lien for labor and materials rests upon the basis, that such labor and materials have entered into and contributed to the production or equipage of the thing on which the lien is impressed. Where therefore, materials are sold and delivered for building a vessel, but are not actually applied to that purpose, the vendor has no lien on the vessel for such materials. The necessity in such cases is imposed upon the materialman, of seeing to it, that his materials are applied to the purpose for which they are procured. Opinion by SANDFORD, J. — *Ib.*

Witness — Right to refresh Memory by reference to written Memoranda — Practice. A witness upon the trial of an action has the right to look at a memorandum, being an extract from entries in the partnership books of which he was a member, for the purpose of refreshing his recollection, without producing the books themselves where he does not testify from the paper. It matters not too, whether the original entries have been made by the witness so long as he swears positively to the facts. — *Howland* v. *Willetts.*

Where a judge upon the trial of a cause, allowed the jury to take with them the deposition of a witness, which had been read in the course of the trial, *held*, that such a permission was not the proper subject of an exception, but if wrong, was an irregularity which would not of itself avoid the verdict, and the only remedy is by motion to the Court to set aside the verdict. — *Ib.*

Where an action was commenced against a public officer out of the proper county, and no objection was made upon the trial of the cause and only upon the arguments of the bill of exceptions; *held*, that the objection came too late. Opinion by MASON, J. — *Ib.*

Miscellaneous Intelligence.

THE LEGISLATION OF THE FIRST SESSION OF THE 32d CONGRESS.— Congress adjourned on the 31st of last August, after a continuous session of nine months. Very little of the national legislation affects the law. It is generally devoted to subjects and objects in which lawyers take but little interest. With the political excitement and turmoil of Congress, this periodical has nothing to do. It matters not whether Congress is in session three or nine months, its duty is merely to report what is done therein affecting the law. Some of the episodes in congressional life, however, it can notice as falling peculiarly within its province — as for example, indictments against senators; and the fact that representatives are bound over to keep the peace. The present session of Congress has been somewhat exempt from these unamiable peculiarities. There has been no pistol or bowie knife drawn on the floor of the Senate by one Senator against another, and but one "set-to" of fisticuffs between members in the House. To be sure a senator committed an assault and battery within the capitol upon an unoffending gentleman, and it was found necessary in the House to suggest to the Speaker to close the rooms adjacent to the hall of the House, of which the lobby members had made tip-

pling shops, after a scene had been enacted by and before the representatives of a free people, which would put Ann Street or the Five Points to the blush. Yet public opinion is so depraved that these enormities can be committed, and their authors still be treated and ranked as gentlemen!

The whole number of acts passed at this session was 116. Of which 64 or 65 were public acts, and the others concerning private individuals or private interests. There were also 17 pieces of that non-descript kind of legislation, known as joint resolutions. But few of the public acts have any general interest. One of the earliest of the laws passed was that making land warrants assignable, chap. xix. It provides, in general, that all warrants for military bounty land, which have been, or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, may be assigned by an instrument in writing made and executed after this act takes effect, according to such regulations as the commissioner of the land-office may prescribe, so as to vest the assignee with all the rights of the original owner of the warrant or location. Some general provisions are made for the location of these warrants, and for their being taken in payment for preëmption rights. The benefits of the bounty land act of September 28th, 1850, are extended to the officers and soldiers of the militia or volunteers, or state troops of any state or territory who were called into military service, and whose services have been paid by the United States, subsequent to June 18, 1812.

The act, chapter xx. is an amendment of the act of July 29, 1850, to provide for the holding of the Courts of the United States in case of the sickness or other disability of the judge of the District Courts.

The authority conferred by that act may be exercised by any circuit judge or the chief justice, if upon the certificate of the clerk of the circuit or district under the seal of the court, it shall appear to the judge "that the public interests from the accumulation or urgency of business in any district require." The district judge so designated has the powers of the resident district judge, and each of the said district judges may separately hold a district or circuit court at the same time in such district. But no district judge shall hear appeals from the district court. By chapter xliv. similar provisions are made for the assistant judges of the District of Columbia to act in case of the sickness or disability of the district judge. This act was made necessary by the continued sickness of the venerable Judge Cranch. It is also provided "that the said judges and each of them are authorized to exercise original jurisdiction in admiralty cases for the purposes of this act." It is understood that this provision was made to permit the prize case of the Admittance (see the case of *Jecker et al.* v. *Montgomery*, 13 How.) to be heard at Washington. Chapter cvii. also provides that appeals from the decisions of the commissioner of patents may be made to either of the said district judges as well as to the chief justice.

Chapter lv. also relates to the District of Columbia, and extends the penalties of the third section of the act of 1831, chapter xxxvii., to the malicious or wilful burning, or attempting to burn the same, with intent to defraud, any house or outhouse, whether occupied or unoccupied for any purpose.

In chapter lxvi. the deficiency appropriation act, and in chapter ciii. section 3, the Indian Appropriation Act, it is provided, "That no part of the appropriations herein made or that may hereafter be made for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe, or part of a tribe; but shall, in every case, be paid directly to the Indian, or Indians themselves, to whom it shall be due, or to the tribe or part of a tribe *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise under the direction of the

President. Nor shall the executive branch of the government, now or hereafter, recognise any contract between any Indian, or tribe, or part of a tribe, and any attorney or agent for the prosecution of any claim against the government under this act."

Chapter lxxiv. increases the number of representatives by one — making the whole number 234 — and permits the Secretary of the Interior, when the decennial census of any district is improperly taken or returned, to order new enumeration in such district. The enlarging of the number of representatives is said to have been the settlement of the question, whether South Carolina or California should have a fractional representative. Instead of deciding between the two, the number was enlarged, so that each state gained one.

Chapter lxxiii. is an act to grant the right of way to all rail and plank roads, and all macadamized turnpikes passing through the public lands belonging to the United States. The general provisions are, that all such companies, now, or within ten years hereafter, chartered, may take a tract of such lands 100 feet wide, as located in their charter, and in deep excavations or heavy embankments they may take 200 feet wide. They may take from the public lands in the vicinity, materials necessary or convenient for the first construction of the roads. They may take land for sites of depots, shops, &c., of not more than one acre each, and no two any nearer than ten miles. Only such lands as are held for private entry or sale can be so taken. Plats and surveys of the lands so taken must be filed with the land commissioner before they are operative. All roads must be begun within ten, and completed within fifteen years, from the passage of this act. If the roads are discontinued the grants revert to the government. A similar special grant was made in 1850, to the Illinois Central Railroad, and at this session by chapter xlv. the right of way and a portion of the public lands were granted to the state of Missouri to aid in the construction of certain railroads in that state, and by chapter xcii. lands in Michigan were given to aid in the construction of a ship canal around the falls of the St. Mary's.

These acts go farther than that giving the right of way to plank-roads, inasmuch as the alternate sections of land for certain sections in width are granted to the road, with a stipulation that the roads shall be public highways for the United States, on which public property and troops may pass without toll, and on which the mails may be carried at such prices as Congress may direct.

Chapter xci. has settled the vexed question of the public printing. It and the binding are hereafter to be done for prices specifically and minutely set forth in the act; the paper of a prescribed quality to be furnished by the government. The President is to appoint a Superintendent of Printing, with a salary of $2500 per annum, shall who give bonds in $20,000, whose term of office shall be two years, commencing with the first day of the session of each Congress. He must be a practical printer, and versed in printing and bookbinding. If he is interested directly or indirectly in any thing connected with the business of his office, he forfeits his office, and is liable to fine and imprisonment. He has the oversight of the whole matter of printing—the purchase of paper, and the public printers. The printing not only of each branch of the legislature, but also of the departments is to be done by a public printer elected by each house. Each house may elect for the public printer the same or a different person. Strict provision is made for the prompt execution by the printer of all work put into his hands.

The great measure of the session is Senator Davis' steamboat bill, chapter cvi., "for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." The act is of great length.

It is very minute and stringent in its provisions. It is the first comprehensive effort to bring the owners and officers of steamboats within the control of the law. It passed the Senate near the middle of the session, but lingered in the other branch under the opposition of steamboat proprietors, until the appalling calamities and wholesale murders on the Hudson and Lake Erie forced it as a necessity through the House. Some of its provisions may be crude and require amendment—but as a whole it must lessen somewhat the number of victims of the recklessness and incapacity and cupidity of the owners and officers of this class of vessels. It materially changes the law in regard to common carriers of passengers and goods on board such vessels. We can give but a meagre outline of the act.

No custom-house papers can be given to any such vessel, until a certificate is filed that the provisions of this act have been complied with, and if such a vessel attempts to carry passengers without complying with certain terms of the act, it shall be forfeited. Before the certificate is granted, the inspectors must be satisfied that the specified precautions against any combustible material being placed near heated iron, unless a column of air or water passes between, or unless it is shielded by some incombustible material — that each vessel has at least three double acting forcing pumps of certain dimensions, with hose of suitable length, and all in working order — that there are suitable and sufficient life-boats, and floats and life-preservers, and buckets and axes on board each vessel in proportion to its size, and the number of passengers it can carry. No explosive substance or burning fluid, or materials which ignite by friction shall be carried as freight, unless the vessel is specially licensed therefor by the inspectors, and unless the several articles are marked and put up separately in chests of metal, or lined with metal. All such vessels must be inspected annually, and all engineers and pilots on board thereof must be licensed — the license to run only for one year — and be sworn to the discharge of their duties.

For the purposes of inspection and licensing, nine Supervising Inspectors are appointed by the President who will assign to each other the limits within which each will perform his duties. They have the general oversight of the whole subject, as well of the local inspectors, as of the master, owners, engineers and pilots of vessels, and it is made their duty to see that all violations of the law are promptly prosecuted and punished.

In addition to this general board of inspectors, there are local inspectors appointed as follows. In certain collection districts, twenty-five in number, embracing the places chiefly interested in steamboat navigation, the district judge of the United States for that district, the supervising inspector, and the collector, or other chief officer of the customs, subject to the approval of the Secretary of the Treasury, designate two inspectors of suitable qualifications respectively, one to be called the Inspector of Hulls, and the other the Inspector of Boilers. These two persons in each district do the inspection upon the application in writing of the master or owner of each vessel; they will inspect it each year, and if the minute requirements of the act are complied with, they will give a certificate to that effect under oath to the collector of the district. The certificate shall minutely state in what repects the requisites of the law are complied with by the vessel. When any person applies to be appointed engineer, the inspectors shall examine him, and the proofs he produces in support of his claim, and if upon full consideration they are satisfied that his character, habits of life, knowledge and experience in the duties of an engineer are such as to make him a suitable and safe person for the position, they give him a license, and state to which grade of engineers he is fitted to belong. Upon like application and examination, and upon proof of requisite skill, and that he is trust-

worthy and faithful, they shall license any pilot. If the inspectors do not grant a certificate to a vessel, or a license to an engineer or pilot, they shall state their reasons in writing, and an appeal, within a certain period, lies from their decision to the supervising inspectors. Any certificate or license may be revoked or annulled by the inspector for cause, with the right on the part of the holder to appeal to the supervising inspector.

The inspectors shall examine such vessels at seasonable times during the year for which they are licensed, and see that the requisitions of the law are complied with. It is made the duty of all officers of such vessels to state to the inspectors any defects that may exist in such vessel or in her machinery, and to make known to them at the earliest opportunity any accidents that may have occurred. The inspectors may call witnesses, and compel their attendance; the witnesses to be paid their travel and attendance by the collector of the district. A tariff of fees for certificates and licenses is made, and the sums collected make a fund out of which the salaries of the inspectors and the other expenses under the act are paid.

The compliance with the provisions of the act are enforced by suitable penalties and punishments. The knowingly carrying on board such a vessel any loose hemp, or bale of hemp, unless protected by bagging, or any explosive substance or materials that ignite by friction unless licensed, renders the offender liable to a penalty of $100 for each offence, to be recovered in an action of debt. And the packing or shipping such articles, unless packed and marked as required by the act, is made a misdemeanor and subjects the offender to a fine of not over $1000, or to imprisonment of not more than eighteen months or both. The intentionally loading or obstructing the safety valve of a boiler, &c. is made a misdemeanor, and every person directly or indirectly concerned therein shall forfeit $200, and may besides be imprisoned not over eighteen months. If there is a deficiency of water in the boiler, so that it falls below a certain line, unless it happen from inevitable accident, the master, if it be by his order, assent or connivance, and the engineer or other person whose duty it is to keep up the supply, shall be guilty of an offence, and shall be fined $100 each, and if an explosion or collapse happen therefrom, they may be imprisoned not less than six nor more than eighteen months. Any one who shall counterfeit the stamps required by the act, or shall falsely stamp any boiler iron, shall upon conviction be fined not over $500, and be imprisoned not over two years. The making for such a vessel a boiler of iron intended to generate steam of unstamped iron, or the using of such boiler, subjects the offender to a forfeiture of $500, to be recovered in an action of debt by any person suing for the same. If any collector or other chief officer of the customs or inspector does not enforce the provisions of the act against all such steamers arriving and departing, he shall forfeit $100, and be removed from office. If any inspector shall certify falsely in regard to any vessel, &c., he shall be punished by fine not exceeding $500, or imprisonment not exceeding six months, or both. The navigating a vessel not in all respects conforming to her certificate, subjects the commander, if conscious of the defect, to a fine of $100, or imprisonment not over two months, or both. If the master of any such vessel neglects or refuses to keep two copies of this act about his vessel, or refuses, unreasonably, to show a copy of it to any passenger who shall ask it, he shall forfeit $20. If any inspector receive on any pretence any fee or reward, except as allowed by this act, he shall be punished by fine not exceeding $500, or by imprisonment not exceeding six months or both.

It is made the duty of the supervising inspectors to collect all information within their reach upon the various subjects connected with their duty, and to report the same to the Secretary of the Treasury, who, if he shall think

proper, shall publish the same. The pay of the Supervising Inspectors, is $1500 per annum—that of the local inspectors varies from $200 in the district of Vermont to $2000 in the district of New York.

We give entire certain sections of the act which affect the law of common carriers, and which relate to some other matters.

Sec. 10. In those cases where the number of passengers is limited by the inspectors' certificate, it shall not be lawful to take on board of any steamer a greater number of passengers than is certified by the inspectors in the certificate; and the master and owners, or either of them, shall be liable, to any person suing for the same, to forfeit the amount of passage-money and ten dollars for each passenger beyond the number allowed. And, moreover, in all cases of an express or implied undertaking to transport passengers, or to supply them with food and lodging, from place to place, if suitable provision is not made of a full and adequate supply of good and wholesome food and water, and of suitable lodging for all such passengers, or where barges or other craft impeding the progress are taken in tow, for a distance exceeding five hundred miles, without previous and seasonable notice to such passengers; in all such cases the owners and the vessel shall be liable to refund all the money paid for the passage, and to pay also the damage sustained by such default or delay: *Provided, however*, That if in any such case a satisfactory bond is given to the marshal for the benefit of the plaintiff, to secure the satisfaction of such judgment as he may recover, the vessel shall be released.

Sec. 28. On any such steamers navigating rivers only, when from darkness, fog, or other cause the pilot on watch shall be of opinion that the navigation is unsafe, or from accident to, or derangement of, the machinery of the boat, the engineer on watch shall be of the opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor or moored as soon as it prudently can be done: *Provided*, that if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he shall do the same; but in such case both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger and his baggage from said causes in so pursuing the voyage, and no degree of care or diligence shall in such case be held to justify or excuse the person in command, or said owners.

Sec. 29. It shall be the duty of the supervising inspectors to establish such rules and regulations to be observed by all such vessels in passing each other as they shall from time to time deem necessary for safety; two printed copies of which rules and regulations, signed by said inspectors, shall be furnished to each of such vessels, and shall at all times be kept up in conspicuous places on such vessels, which rules shall be observed both night and day. Should any pilot, engineer, or master of any such vessel, neglect or wilfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing, shall be liable to a penalty of thirty dollars, and to all damage done to any passenger in his person or baggage by such neglect or refusal; and no such vessel shall be justified in coming into collision with another if it can be avoided.

Sec. 30. Whenever any damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed

as to navigating such steamers, may sue such engineer or pilot and recover damages for any such injury caused as aforesaid by any such engineer or pilot.

Sec. 35. It shall be the duty of the master of any such steamer to cause to be kept a correct list of all the passengers received and delivered from day to day, noting the places where received and where landed, which record shall be open to the inspection of the inspectors and officers of the customs at all times: and in case of default, through negligence or design, the said master shall forfeit one hundred dollars, which penalty, as well as that for excess of passengers, shall be a lien upon the vessel: *Provided, however*, a bond may, as provided for in other cases, be given to secure the satisfaction of judgment.

Sec. 41. All penalties imposed by this act may be recovered in an action of debt by any person who will sue therefor in any court of the United States.

Sec. 42. This act shall not apply to public vessels of the United States, or vessels of other countries, nor to steamers used as ferry-boats, tug-boats, towing-boats, nor to steamers not exceeding one hundred and fifty tons burden, and used in whole or in part for navigating canals. The inspection and certificate required by this act shall, in all cases of ocean steamers constructed under contract with the United States for the purpose, if desired, of being converted into war steamers, be made by a chief engineer of the navy, to be detailed for that service by the Secretary of the Navy; and he shall report both to said secretary and to the supervising inspector of the district where he shall make any inspection.

Sec. 43. All such parts of this act as authorize the appointment and qualification of inspectors, and the licensing of engineers and pilots, shall take effect upon the passage thereof, and that all other parts of this act shall go into effect at the times and places as follows: In the districts of New Orleans, St. Louis, Louisville, Cincinnati, Wheeling, Pittsburgh, Nashville, Mobile, and Galveston, on the first day of January next, and in all other districts on the first day of March next.

The sixth and seventh sections of chapter cxi., in a few lines override the decision of the Supreme Court last winter in the famous Wheeling Bridge case. They are as follows:

Sec. 6. The bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding.

Sec. 7. The said bridges are declared to be and are established post-roads for the passage of the mails of the United States, and the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation; and the officers and crew of all vessels and boats navigating said river are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges.

Chapter cxii. provides for thee stablishment of a Light-house Board, and is an attempt to introduce system and economy in this large expenditure of the public money. The board is composed of two officers of the navy of high rank, one officer of the engineer corps of the army, and one of the topographical engineers, two civilians of high scientific attainments, whose services may be at the disposal of the President, with an officer of the engineers and of the navy as secretaries. "The board so constituted shall be attached to the office of the Secretary of the Treasury, and, under his

superintendence, shall discharge all the administrative duties of said office relating to the construction, illumination, inspection, and superintendence of light-houses, light-vessels, beacons, buoys, sea-marks, and their appendages, and embracing the security of foundations of works already existing, procuring, illuminating, and other apparatus, supplies and materials of all kinds for building and for re-building when necessary, and keeping in good repair the light-houses, light-vessels, beacons, and buoys of the United States."

Chapter xcviii. is the amended postage law — we give its principal sections entire.

Sec. 1. Each newspaper, periodical, unsealed circular, or other article of printed matter, not exceeding three ounces in weight, shall be sent to any part of the United States for one cent, and for every additional ounce, or fraction of an ounce, one cent additional shall be charged; and when the postage upon any newspaper or periodical is paid quarterly or yearly in advance at the office where the said periodical or newspaper is delivered, or is paid yearly or quarterly in advance at the office where the same is mailed, and evidence of such payment is furnished to the office of delivery in such manner as the Post-Office Department shall by general regulation prescribe, one half of said rates only shall be charged. Newspapers and periodicals not weighing over one ounce and a half, when circulated in the State where published, shall be charged one half of the rates before mentioned: *Provided*, That small newspapers and periodicals, published monthly or oftener, and pamphlets not containing more than sixteen octavo pages each, when sent in single packages, weighing at least eight ounces, to one address, and prepaid by affixing postage stamps thereto, shall be charged only half of a cent for each ounce or fraction of an ounce, notwithstanding the postage calculated on each separate article of such package would exceed that amount. The postage on all transient matter shall be prepaid by stamps or otherwise, or shall be charged double the rates first above mentioned.

Sec. 2. Books, bound or unbound, not weighing over four pounds, shall be deemed mailable matter, and shall be chargeable with postage at one cent an ounce for all distances under three thousand miles, and two cents an ounce for all distances over three thousand miles, to which fifty per cent. shall be added in all cases where the same may be sent without being prepaid, and all printed matter chargeable by weight shall be weighed when dry. The publishers of newspapers and periodicals may send to each other from their respective offices of publication free of postage one copy of each publication; and may also send to each actual subscriber, enclosed in their publications, bills and receipts for the same, free of postage. The publishers of weekly newspapers may send to each actual subscriber within the county where their papers are printed and published one copy thereof free of postage.

Sec. 3. No newspaper, periodical, magazine, or other printed paper or matter, shall be entitled to be sent at the rates of postage in this act specified, unless the following conditions be observed:

First. It shall be sent without any cover or wrapper, or in a cover or wrapper open at the ends or sides, so that the character of the matter contained therein may be determined without removing such wrapper. *Second*. There shall be no word or communication printed on the same after its publication, or upon the cover or wrapper thereof, except the name and address of the person to whom it is to be sent. *Third*. There shall be no paper or other thing inclosed in or with such printed paper: and if these conditions are not complied with, such printed matter shall be subject to letter postage; and all matter sent by mail from one part of the United States to another, the postage of which is not fixed by the provis-

ions of this act, shall, unless the same be entitled to be sent free of postage, be charged with letter postage.

Sec. 4. If the publisher of any periodical, after being three months previously notified that his publication is not taken out of the office to which it is sent for delivery, continue to forward such publication in the mail, the postmaster to whose office such publication is sent may dispose of the same for the postage, unless the publisher shall pay it; and whenever any printed matter of any description, received during one quarter of the fiscal year, shall have remained in the office without being called for during the whole of any succeeding quarter, the postmaster at such office shall sell the same and credit the proceeds of such sale in his quarterly accounts, under such regulations and after such notice as the Post-Office Department shall prescribe.

Among the miscellaneous provisions of the General Appropriation Act, (chapter cviii.) are the following respecting extraordinary expense incurred by ministerial officers of the United States in executing the laws, and relating to appeals from the decisions of the California Land Commissioners.

Sec. 11. Where the ministerial officers of the United States have incurred or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof, under the special taxation of the district or circuit court of the district in which the said services have been, or shall be, rendered, to be paid from the appropriation for defraying the expenses of the judiciary.

Sec. 12. The President of the United States shall appoint an associate law agent for California, learned in the law and skilled in the Spanish and English languages, whose duties and compensation shall be the same as those of the law agent: *Provided*, that the compensation of the agent and associate shall not exceed five thousand dollars each. And in every case in which the board of commissioners on private land claims in California shall render a final decision, it shall be their duty to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded, one of which transcripts shall be filed with the clerk of the proper district court, and the other shall be transmitted to the Attorney-General of the United States, and the filing of such transcript with the clerk aforesaid shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk aforesaid within six months thereafter of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States; and on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed.

The 3d section of chapter lxiii. makes the stealing, embezzling, or the obtaining by false pretence, or the receiving, unlawfully making, forging, or counterfeiting, and the aiding and assisting therein, the key of any lock in use on any mail-bags, — or the having in possession such mail-key or lock with the intent unlawfully to use or dispose of the same, a felony, and punishes it by imprisonment not exceeding ten years.

Section 4 makes the stealing, &c. any mail-bag or other property in the use or belonging to the Post Office-Department, and the aiding or abetting therein, if the value of the property exceed $25, a felony, and punishable with imprisonment for not exceeding three years. If the value is less than

$25, the punishment is imprisonment of not more than a year, and a fine of not less than $10, nor more than $200.

Section 5th contains the most stringent provisions against the "illegal transportation or sending of letters. "The collector and every officer of the customs at every port, without special instructions, and every special agent of the Post-Office Department, when instructed by the Postmaster-General to make examinations and seizures, shall carefully search every vessel for letters which may be on board, or have been carried or transported contrary to law; and each and every of such officers and agents, and every marshal of the United States and his deputies, shall at all times have power to seize all letters, and packages, and parcels, containing letters, which shall have been sent or conveyed contrary to law on board any ship or vessel, or on or over any post-route of the United States, and to convey such letters to the nearest post-office; or may, if the Postmaster-General and Secretary of the Treasury shall so direct, detain the said letters or any part thereof, until two months after the trial and final determination of all suits and proceedings which may at any time, within six months after such seizure, be brought against any person for sending, or carrying, or transporting any such letters contrary to any provisions of any act of Congress; and one-half of any penalties that may be recovered, for the illegal sending, carrying, or transporting of any such letters, shall be paid to the officers so seizing, and the other half to the use of the Post-Office Department; and every package or parcel so seized, in which any letter shall be concealed, shall be forfeited to the United States, and the same proceedings may be had to enforce such forfeiture as are authorized in respect to goods, wares and merchandise forfeited by reason of any violation of the revenue laws of the United States; and all laws for the benefit and protection of officers of the customs seizing goods, wares or merchandise, for a violation of any revenue laws of the United States, shall apply to the officers and agents making seizures by virtue of this act.

Section 8. The Postmaster-General shall furnish all postmasters and other persons applying and paying therefor, suitable letter envelopes, with such watermarks or other guards against counterfeits as he may deem expedient, and with one or more suitable postage stamps, with such device, and of such denominations and value as he may direct, printed or impressed thereon; which envelopes shall be sold at the cost of procuring and furnishing the same, as near as may be, with the addition of the value or denomination of the postage stamps so printed or impressed thereon or attached thereto as aforesaid; and letters when inclosed in such envelopes, with postage stamps printed or impressed thereon, (the postage stamp or stamps in every such case being of the value, denomination or amount required to prepay the postage which would be chargeable on such letters and envelopes, if sent by mail to the place of their destination, under the provisions of the laws then in force, and such stamps and envelopes not having been used before,) shall pass in the mails as prepaid letters; and all letters inclosed in such envelopes as shall be provided and furnished by the Postmaster-General, as first in this section prescribed, and with postage stamps thereon as aforesaid, (and such postage stamps on such envelopes being equal in value and amount to the rates of postage to which such letters would be liable if sent by mail, and such postage stamps and envelopes not having been before used,) may be sent, conveyed and delivered otherwise than by post or mail, notwithstanding any prohibition thereof under any existing law: *Provided*, that said envelope shall be duly sealed, or otherwise firmly and securely closed, so that such letter cannot be taken therefrom without tearing or destroying such envelope, and the same duly directed and addressed; and the date of such letter, or the receipt or

transmission thereof will be written or stamped, or otherwise appear on such envelopes.

Much necessary legislation was omitted by Congress. First in point of morals and ethics was the indemnity bill for French spoliations, which was not acted upon in the house. Then the wise and necessary recommendation of President Fillmore as to a revision or codification of the laws of the United States, was not, so far as we know, even referred to a committee. The house bill regulating the fees of the clerks, marshals, and district attorneys of the United States courts, was lost in the Senate. We hope in some future number to refer to these and other, omitted measures, and especially to the last, and to some passages in its history.

PRACTICE IN WISCONSIN. A correspondent has sent us the pleadings in a suit for libel in Rock county, Wisconsin. We give the declaration, and parts of the demurrer, which show that the driest part of the practice in that state is its wit.

Declaration in a Plea of Trespass. For that whereas the said plaintiff, before and at the time of the committing of the said grievances by the said John M. Keep as hereinafter mentioned, and before and on the 22d day of May, 1851, had exercised and carried on, and still doth exercise and carry on the trade and business of a blacksmith, to wit: at Beloit, in the said county of Rock, and was daily and honestly acquiring great gains and profits in his aforesaid trade and business, to the comfortable support and maintenance of himself and his family: and whereas, also, the said plaintiff now is a living, good, true, honest, just, and faithful citizen of this government, and as such hath always behaved and conducted himself honorably, and always was reputed, esteemed and accepted by and among all his neighbors and all other good and worthy citizens to whom he was in any wise known, to be a person of good name, fame and credit, to wit, at Beloit, in the county of Rock aforesaid, also to wit, at Buffalo, in the county of Erie, in the state of New York, also to wit, at Rochester, in the county of Monroe, in the state of New York aforesaid, by means of which said premises he, the said Andrew R. Mosher, before the committing of the said several grievances by the said John M. Keep, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens to whom he was in any wise known, to wit, at Beloit aforesaid, also at Buffalo and Rochester aforesaid; yet the said John M. Keep, well knowing the premises, and greatly envying the happy state and condition of the said Andrew R. Mosher, and contriving, and wickedly, maliciously, and wrongfully intending to injure the said Andrew R. Mosher in his said good name, fame, and credit, and to bring him into public scandal and ridicule with and among all his neighbors and other good and worthy citizens, and to cause it to be believed by those neighbors and citizens that he, the said Andrew R. Mosher, was dead, and that he, the said plaintiff, had been, and was a man of disreputable character, and to vex, harass, ridicule impoverish, oppress, and wholly ruin him, the said Andrew R. Mosher, heretofore, to wit, on the 22d day of May, A. D. 1851, at Beloit aforesaid, wrongfully and maliciously did compose and publish, and cause and procure to be published, in a newspaper called and named the "Beloit Journal," printed and published in the town of Beloit, in the county of Rock aforesaid, and circulated and read in the cities of Buffalo and Rochester aforesaid, and also in a newspaper called and named the "Buffalo Courier," printed and published at the city of Buffalo aforesaid, and in a newspaper called and named the "Rochester Democrat," printed and published in the city of Rochester aforesaid, of and concerning the said Andrew R. Mosher, a certain scandalous, malicious, and defamatory libel, in the words and figures following, to wit, (meaning ironically).

"*Communicated.*

"Died, in this village, on the 15th instant, after a lingering and painful illness, which he bore with Christian fortitude and resignation, [meaning said plaintiff was a hypocrite,] A. R. Mosher, Esq., [said plaintiff meaning,] long and favorably known in this community as an active, energetic business man, of the strictest integrity, [meaning that said plaintiff was a dishonest man, and dishonest in business, and a man of no integrity,] and the author of 'Lectures on Baptism,' [meaning to ridicule said plaintiff as a religionist and as an advocate and lecturer on Baptism.] In early life he was favorably known in Buffalo, Rochester, and other eastern cities, as an actor of decided merit upon the stage, [meaning to ridicule said plaintiff for having been a comedian, and further meaning that said plaintiff had been a comedian, and, as such, meaning to expose him to the jeers of his neighbors,] and his old friends in that region [meaning Buffalo and Rochester in the state of New York] will long remember his popular debuts in the characters of Othello and Richard III., [meaning that at Buffalo and Rochester aforesaid he had been the laughing-stock of community as a comedian.] Peace to his remains," [meaning the remains of said plaintiff.]

"☞ Buffalo and Rochester papers please copy."

By means of committing of which said several grievances by the said John M. Keep, the said Andrew R. Mosher hath been and is greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and among all his neighbors and other good and worthy citizens of this government to whom he was in any wise known, insomuch that divers of those neighbors and citizens to whom the innocence, candor, truth, integrity, reverence and respect for religion of the said Andrew R. Mosher were unknown, have, on occasion of the committing of the said several grievances by the said John M. Keep, from thence hitherto ridiculed, and suspected, and believed, and still do ridicule, suspect, and believe the said Andrew R. Mosher to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been and still be guilty of hypocrisy, malice, uncharitableness, and falsehood, and have, by reason of the committing of the said several grievances by the said John M. Keep, from thence hitherto refused, and still do refuse, to have any acquaintance, intercourse, or discourse with the said Andrew R. Mosher, as they were before used and accustomed to have, and otherwise would have had, and also by reason thereof, one Richard Davis Garde, who, before and at the time of the committing of the said grievances, was about to retain and employ, and would otherwise have retained and employed, the said Andrew R. Mosher to do and perform certain work for him, the said Richard Davis Garde, as a blacksmith, for a certain compensation to be therefor paid to him, the said Andrew R. Mosher, afterwards, to wit, on the day and year aforesaid, at Beloit aforesaid, wholly refused to employ the said Andrew R. Mosher to do and perform certain blacksmith work for him, the said Richard Davis Garde, and the said Andrew R. Mosher hath been and is, by means of the premises, otherwise greatly injured, to wit, at Beloit, in the county of Rock and state of Wisconsin aforesaid, also to wit, at Buffalo, in the county of Erie and state of New York aforesaid, also to wit, at Rochester, in the county of Monroe and state of New York aforesaid, to the damage of the said Andrew R. Mosher of one thousand dollars, for which he brings suit, &c.

The defendant demurred to the above declaration, and issue was joined on the demurrer. The following are assigned as some of the causes of the demurrer:

Third. There is no statement or colloquium in the said amended

declaration, showing that until the time of the publication of the alleged libel, the plaintiff was never suspected or believed to be dead.

Fifth. The alleged libel does not in any way relate to the plaintiff in his trade and business as a blacksmith, and does not charge or impute any misconduct to the plaintiff in his trade or business.

Seventh. The said amended declaration does not allege that the plaintiff, by reason of the publication of the alleged libel, has been suspected or believed to be dead.

Ninth. The statements in said alleged libel are not libellous, and there is no sufficient inducement or colloquium to support the allegations in the innuendoes following such statements.

Eleventh. The said amended declaration is bad for duplicity in alleging in one count a publication by defendant in three different newspapers printed and published at different times and places.

Twelfth. The statement in the supposed libel "that the plaintiff died after a long and painful illness, which he bore with Christian fortitude and resignation," does not justify the innuedo that the plaintiff was a hypocrite. From the sad hour of the Saviour's crucifixion to the present day, there has been on earth a remnant of his devoted band, and many of them have borne sickness and pain, and even the horrors of death with the courage of martyrdom.

Thirteenth. The cause of action is expressed to be, that those who did not know the plaintiff have since said publication believed the plaintiff to have been guilty of the offences and improper conduct in the supposed libel mentioned. The conduct imputed is having borne pain with fortitude and resignation, which is no offence, and not at all improper.

Fourteenth. The declaration only avers "that the plaintiff is a living citizen," which no way disproves the communication, since he that was dead arose and lived, in obedience to the command "Lazarus, come forth." The declaration should have said the plaintiff from his birth had been, and then was "a living man."

Fifteenth. It is not stated in what sense the words were spoken. The defendant may have intended in saying that the plaintiff was dead, to say that he was dead in trespasses and in sins, — a state and condition which no way injures a blacksmith in his trade and profession, as the declaration expressly says the plaintiff, at the time of said publication, was getting from his trade great profits and gains.

DISCHARGE OF OFFENDERS IN NEW YORK CITY BY ALDERMEN, WITHOUT INVESTIGATION — The press of New York has complained latterly, that some of the Aldermen of that city have taken it upon themselves, in numerous instances, to visit the station-houses, and, without any judicial investigation, to discharge the prisoners in confinement there. A list of the persons so discharged, and of the offences for which they were committed, was given, from which it appeared that those guilty of grievous crimes, and of serious disturbances of the public peace, had thus escaped justice. The evil became so intolerable, that the grand jury made an investigation. In reply to a request from the foreman of the grand inquest, the District Attorney gave the following opinion: —

Office of the District Attorney of the City and County of New York.

To the Grand Jury. August 4, 1852.

Gentlemen, — I hasten to reply to your communication requesting my views as to the power assumed by the aldermen and police justices in constantly discharging offenders without any judicial investigation. The subject is of great importance, and, as one of public complaint, has

already commanded my attention. I embrace, therefore, the opportunity afforded by your communication, to place before you, as the constituted guardians of public order, my legal conclusions upon your inquiry. The powers and duties of aldermen of this city are derived from the charter, and from various statutes, which either modify or restrain, or add to the powers conferred by the charter. By the charter and by the revised statutes, vol. 2, No. 704 and 705, aldermen are created conservators of the peace, and clothed with the authority of justices of the peace in criminal cases. Their powers in relation to the arrest and discharge of prisoners, when not conferred or prescribed by statute, are derived from the common law respecting justices of the peace. A constable or peace officer, having arrested an offender, may confine him, and it is his duty to keep him in custody until he brings him before a justice of the peace. The prisoner is, therefore, so much in lawful custody, that the constable may be indicted for suffering an escape, even when the prisoner is improperly bailed. 1 Chitty, Com. Law, 24–73; 2 Chitty, 171, note.

It is his duty to bring the prisoner, within a reasonable time, before a magistrate for examination. That magistrate is then to take the examination of the prisoner and the witnesses, and is either to discharge, to bail, or to commit. But he can do neither without a judicial examination. No other person or officer can interpose than the examining magistrate, except officers authorized to grant a *habeas corpus*. Being in legal custody, the prisoner can only be discharged by process of law.

I am not aware of any principle of law, or of any authority, to warrant a justice of the peace in giving any orders or directions to a constable having a prisoner in charge, unless that prisoner be before him judicially, and then only by proper process.

The constable is as much an officer of the law as the justice, and is amenable to him only in due course of law.

Among the elementary writers and the treatises on the powers and duties of justices, I find no shadow of authority to order the discharge of a prisoner, either orally or in writing, unless after judicial examination, and by due process or order. No justice, says Chitty, (vol. 1, p. 367,) can supersede the warrant of another, without a formal and legal examination. The commitment by the constable is a legal warrant, and the principle is the same. The case of the *King* v. *Brooke*, and others, (2 Term Rep. 194,) shows how the court of king's bench regard similar conduct. The offence there charged against magistrates was the taking upon themselves to discharge the prisoner without even hearing the allegations against him. This means, of course, a judicial hearing. I have no doubt, therefore, that no alderman or police justice has the right to discharge a prisoner from custody, unless upon judicial examination, after hearing the charge and witnesses. The right has never been claimed by aldermen in any other city in this state, although they have the like general powers of our own aldermen, nor has it been assumed in London.

The publication of this opinion encouraged some of the police captains to retain their prisoners in spite of aldermanic interference. Others, however, conformed to the old practice, and released offenders at the pleasure of the aldermen of their ward. Effectually to prevent this, the mayor of New York obtained the following additional opinion from Mr. Blunt, and issued orders that all police officers should act in accordance therewith: —

Angust 30, 1852.

Dear Sir, — I have already furnished to the grand jury my opinion of the illegality of discharges by aldermen and police justices, except by due course of law after individual investigation. I now, at your request, state the result of a compliance by a police officer with such illegal order.

The rule of proceeding, on the part of an officer, is plain and simple. Police officers, in this city, are in criminal matters vested with the powers of constables at common law. They are, in this respect, substituted by statute for the watchmen and marshals existing prior to the act of 1844, and are clothed with all the authority incident to those officers. They have the power to arrest with or without warrant in cases of felony, and in cases of misdemeanor, breaches of the peace, or disorderly and riotous conduct committed in their view, night-walkers, evil-disposed and suspected persons, and reported thieves. All may be arrested; and by statute, (1 R. S., p. 632, and Laws of 1832, p. 9, sec. 1 & 2,) it is made their duty to arrest certain disorderly persons and vagrants. Their office is ministerial in obeying warrants, and original as conservators of the peace at common law, or by virtue of particular statutes.

When an officer has made an arrest with or without a warrant, he is to bring the party as soon as possible before a justice; if by warrant, before the justice who issued the warrant, or in his absence from his office, or inability to act, before some other magistrate, (2 R. S., p. 708, sec. 12); and if guilty of unnecessary delay, it is a breach of duty. But if the time be unseasonable, as in or near night, he should detain him until the next day. If the magistrate who issued the warrant be absent, or the warrant be to bring him before any justice, the power of detention is vested in the officer and not the prisoner, and the former may proceed to any magistrate who has jurisdiction within the county. The same course should be adopted in cases of arrest without warrant. When the arrest has once been made, it is an escape on the part of the officer to let the prisoner go at large, for which he may be indicted, (2 R. S., p. 684, sec. 18, sub. 4,) and on conviction, punished by fine or imprisonment.

In addition to these general principles of law, governing the conduct of constables, the police officers of this city are also controlled by the regulation of the department. These regulations point out the course to be adopted by them in certain cases, and especially prohibit discharges of prisoners.

As I have heretofore stated, no alderman or justice has the power to discharge without judicial investigation in any case, and in the case of arrests by the night watch, or under the present system, the night police, it is questionable whether an alderman can interfere at all. By the act of 1813, (2 R. S., p. 354, sec. 38,) the exclusive power is given to the police justices to examine persons detained by the night watch, and I am not aware of any repeal of that section. I have thus fully reviewed this subject, and am happy to state that my views meet the concurrence of some of our ablest lawyers, among whom I would especially name Hon. John C. Spencer, to whom I am indebted for a valuable brief of the authorities bearing upon the question; and in conclusion I take occasion to state, that in every case of violation of this law in this respect, which shall come officially to my notice, I shall place the matter before the grand jury. Your obedient servant, N. Bowditch Blunt.

Hon. A. C. Kingsland, Mayor.

Juries in Criminal Cases upon the Continent.—Trial by jury in criminal cases was introduced into Belgium, in 1830, at the time of the revolution, when that country separated from Holland. It is based upon the provisions of the Napoleonic Code; in Holland, the system does not exist. It was introduced into the kingdom of Greece in 1834, and is expressly retained by one of the Articles of the new Constitution granted in 1834. In Portugal it was partially granted in 1832, and more fully developed by a law of 1837. In 1838, the number of jury was limited to

six. In 1840, fresh modifications were introduced. The verdict whether of acquittal or conviction must be that of two thirds of the jury at least; but it is the duty of the judge, if he thinks it incorrect, to annul it and refer the question to another jury. Trial by jury was established in Geneva by a law of the 12th of January, 1844. The system there had this peculiarity, that the law recognises a distinction between a verdict of guilty under extenuating circumstances, and one with the words under very extenuating circumstances. The effect of either is to prevent the sentence of death or imprisonment for life from being passed; and of course in the case of the latter verdict, the punishment is slighter than when the former is returned. In 1844, a person was tried for housebreaking and stealing, and two questions were put to the jury; first, whether the prisoner had himself stolen the articles? secondly, whether he was the accomplice of some person unknown who was the actual thief? The jury answered the first in the negative, and the second in the affirmative, adding, "under extenuating circumstances." The court thereupon sentenced the prisoner to five years' imprisonment. He appealed to the Cour de Cassation, on the ground that the second question ought not to have been put, as he was not charged as an accomplice in the indictment, and the court set aside the verdict. He was then tried before another jury, who found him guilty of having stolen the property of the prosecutor "under very extenuating circumstances;" and the court, although they had sentenced him to five years' imprisonment when he had been convicted only as an accomplice, now sentenced him to three years' imprisonment when convicted as a principal, because the second jury had accompanied their verdict with the last-mentioned words.

When the court are unanimously of opinion that a verdict of guilty is wrong, they have the power of annulling it, and remitting the case to be tried by a fresh jury. The prisoner may also appeal to the Cour de Cassation, not upon the merits, but upon the question of informality or defects vitiating the trial.

In Sardinia, jury trial has been lately introduced; and on the 23d of May, 1850, the Archbishop of Turin (M. Franzoni), who refused to appear, was tried and found guilty by a jury, of an offence against the respect due to the laws, by publishing a circular in which he ordered the clergy not to recognise the jurisdiction of the secular tribunals. — *Forsyth on Trial by Jury.* (Pp. 365 - 367.)

Notices of New Books.

A Treatise on the Measure of Damages, or an Inquiry into the Principles which govern the amount of Compensation, recovered in suits at law. By Theodore Sedgwick. One vol. 8vo. pp. 650. Second Edition, greatly revised and enlarged. New York: John S. Voorhies. 1852.

We are glad to see that this very excellent treatise has reached a second edition. Its merits were fully discussed at the time of the publication of the first edition. The pleasant controversy carried on at that time, (April and June, 1847,) in the pages of this journal upon the true "rule of damages in actions *ex delicto*," in which the learning upon the question was exhausted, Mr. Sedgwick has placed in an appendix.

This edition contains the recent cases upon the subject-matter of the book. They have been collected with careful diligence, and have been incor-

porated into the text. In this way the arrangement of the book has been changed, and the paging altered. We regret this, for there is always a difficulty of reference to a work where the different editions do not preserve the original paging. We think the better practice is that adopted by Judge Story and others — that of numbering the sections and referring to them, the number of the sections remaining the same in the various editions, though the paging differs. Two new chapters are added to this edition — one "On Damages with regard to Evidence," and the other on the "Power of the Court over the Subject of Damages."

Mr. Sedgwick has evidently, in the preparation of this edition, expended much time and study. He has not been satisfied by a mere collection of, or reference to, the new cases; but has carefully elaborated many of the chapters in the first edition. We observe also, that in elucidating the text of the former edition, he has frequently in this given in a note the leading cases upon particular points. The volume is not thus simply the accretions of the few years that have intervened since the publication of the first edition, but is the result of the author's subsequent diligent study and matured thought.

We cheerfully commend the book to the profession as the only full treatise upon the subject, and as one in which can be found the whole learning thereon

THE ENGLISH, SCOTCH AND NORTH AMERICAN CRIMINAL PROCEDURE, as connected with the Political, Moral, and Social Conditions, and in the Details of Forensic Practice. Illustrated by Dr. J. A. Mittermaeier, Privy Counsellor and Professor at Heidelberg. (Das englische, scottische und nord-amerikanische Strafverfahren im Zusammenhange mit den politischen, sittlishen und socialen, Zuständen und in den Einzelnheiten der Rechtsübung, dargestellt von.) Published by F. Enke in Erlangen, 1851.

The well known fame of Prof. Mittermaeier, as the most prominent jurist of criminal law on the continent of Europe, and his previous works, are a guaranty that a book from his pen deserves the earnest attention of the jurist. He is not a mere theoretical abstractionist, but a man of a decidedly practical bent of mind, which has not been warped by his great scientific erudition. The present book shows how much he has the improvement of criminal law in his own country at heart, and not merely of his own country, but of the civilized world. He gives here a detailed account of the English criminal law principles, of the spirit of the law of evidence, and the procedure in particular. He begins with giving the history of the development of criminal law in England, Scotland and America, and proceeds by describing in detail the proceedings in all the various stages of a criminal trial, from the preliminary examination to final sentence. It is remarkable to see how the author has made himself thoroughly acquainted with all the best sources of English and American law, and how accurately he has stated the details. It is only in less important matters that he has at times mistaken the true meaning and bearing of points, and it cannot be expected that a person who has not had the experience of an actual practitioner, should not make such mistakes. However, they are in no case such as to hinder a foreign jurist from obtaining a clear and correct view of the English procedure in all its main and important features. By way of illustration, he gives detailed accounts of cases, of which he has examined more than 1500 which occurred within the last three years. The elaborate and excellent report of the Webster case by Geo. Bemis, Esq. of the Boston bar, is frequently referred to, to illustrate the American procedure.

The author says, that this present book (of 560 octavo pages,) is intended as a preliminary work of one greater, which is intended to examine the experiences in the criminal procedures, which have been developed in

different countries, the fundamental ideas on which they are founded, and their effects, and which shall teach how a criminal procedure may be established, which shall secure the interests of civil order as well as liberty, and is a source of comfort to the well disposed, and a terror to all enemies of social order. He justly appreciates the truth, that the legislation on criminal law and procedure is the keystone of the public rights of a people.

REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF CHANCERY, with Notes and References to English and American Decisions, Vol. XXXI. By E. FITCH SMITH, Counsellor at Law. Containing Hare's Chancery Reports, Vol. VI. New York: Banks, Gould & Co., 144 Nassau Street. Albany: Gould, Banks & Co. 475 Broadway, 1852.

This is the latest volume of the valuable series of republication of the English Chancery Reports, which are so well known to the profession. It is only of late years that the American lawyer has been able, at any price, to obtain any thing like a complete series of chancery reports. The importance of the decisions has always been appreciated, for the principles and practice of the English High Court of Chancery have been adopted in most of the United States; but we have been obliged to refer to the meagre and unsatisfactory notes of the earlier reporters, while we have been deprived of the ripe learning and more liberal practice of the English courts in later years. The "English Chancery Reports" comprise the decisions of Lord Eldon, Lord Lyndhurst, Lord Brougham, Lord Cottenham, and others; names too well known to need any comment. This last volume contains the whole of the sixth volume of Hare's Chancery Reports, and brings the series of cases down to 1849. We cheerfully recommend the whole of the series to the profession.

New Publications received.

AN ESSAY on the Security of Remainders. By Wade Keyes, of the Montgomery Bar. Paper, 8vo. pp. 128. Montgomery, Ala. Printed by J. H. & T. F. Martin. 1852.

LETTERS to the Chairman of the Judiciary Committee of the House of Representatives of the United States, from Judge Sprague, of Massachusetts, and Mr. Comptroller Whittlesey, respecting an official statement by the latter annexed to a report of the Judiciary Committee. Paper, 8vo. pp. 28. Boston. Eastburn's Press.

Obituary Notice.

DIED, in Concord, Massachusetts, Sept. 15, HENRY HOLTON FULLER, Esq., of the Boston Bar, aged 62.

A Meeting of the Suffolk Bar was held at the Law Library on the morning of the 18th, at which Sidney Bartlett, Esq. was called to the Chair, and Joseph M. Bell, Esq. chosen Secretary. The following Resolutions were offered by Hon. Charles T. Russell, who had been a student in Mr. Fuller's office, and touching remarks were made by Mr. Russell, William Brigham, and John A. Andrew, Esquires, who had likewise studied with him, and by the Chairman and E. H. Derby, Esq.

Resolved, That the Members of this Bar have heard with deep sorrow the death of a distinguished associate and friend, Henry H. Fuller, Esq.

Resolved, That in the death of Mr. Fuller we are called to deplore the loss of one, who for more than thirty-six years has been an honored, active, and influential member of our Bar, whose ability secured respect and confidence, and whose character won esteem and love; who united to a strong and logical mind and clear and quick apprehension, an accurate and varied learning and eminent professional attainments; who by the faithful pursuit of duty, as well as by his uniform kind-

ness of heart, courtesy of manner, and exemplary life, has left an example which we treasure and commend; and whose decease deprives the Bar of a leading and valued member, and the community of an honored and useful citizen.

Resolved, That in this dispensation of an all-wise Providence, which removes from us one but yesterday our organ in paying the last tribute of respect to an eminent and lamented brother, we recognise a striking admonition amid the duties of the day to remember "that the night cometh, when no man can work"; and in the activities of this, not to forget the responsibilities of the other side of the grave.

Resolved, That we deeply sympathize with the family and friends of the deceased, and that the Secretary transmit to them a copy of these Resolutions.

Resolved, That the Hon. Charles G. Loring be requested to communicate these Resolutions to the Supreme Judicial Court when next in session in this county, with a request that the same be entered upon their records.

Upon the coming in of the Court on the 21st September, Judge Fletcher on the Bench, Mr. Loring addressed the Court as follows:

May it please the Court.—I am deputed by the members of this Bar to present to the court resolutions, adopted at a recent meeting, expressive of their feelings and sympathies excited by the death of Mr. Henry H. Fuller.

It is but a few brief months since he stood where I now stand to perform the like service over the grave of the eldest of our fraternity, then in active practice in the courts, and whose death left him the senior. And now, it devolves upon me, who stand next in that class, to offer this tribute of respect to his memory.

On that occasion he requested me to take a seat by his side, as one whom he knew to entertain the affection and respect for the dead which he deeply felt, and to sympathize in the sentiments which he was about to utter. He was then apparently in his accustomed health and vigor. A short time only elapsed before he was called to commit to the grave the companion of his journey and the beloved partner of his joys and sorrows, and now he has followed her there, and it remains for me to perform in remembrance of him that duty which he so faithfully and touchingly discharged at the tomb of his professional brother.

Nor can it be forgotten on this occasion by the court and members of this Bar, that since our last assembling together, another eminent member though less immediately engaged in its services here, has been removed by death—one who was distinguished for forensic ability, unusually high literary attainment, and by political eminence and influence in the councils of the nation; and the idol of domestic and local affection in his home and neighborhood.

As manly honesty and contempt of hypocrisy were leading traits in the character of Mr. Fuller,—I feel that I shall execute this trust most acceptably to him, as well as most faithfully to others and myself, by forbearing to give an exaggerated coloring to the brighter features of his character or position, or to conceal their shades. All men being essentially imperfect, the highest praise is not that one has no faults, but that by the discipline of probation and the inward struggles which aspirations after the good and perfect demand, natural virtues and defects have been so used, and made so reciprocally active as to form the highest character which their combination was designed to illustrate. There can be no uniform standard of human excellence any more than of human wickedness. "To his own master every man standeth or falleth." And were we accustomed to look upon the peculiar faults of others in the light of their peculiar virtues, we should generally find more to admire or forgive, than to complain of, and become ourselves wiser and better in the contemplation, instead of indulging in censures, often more injurious to ourselves than to them.

Mr. Fuller was the son of a clergyman, and was born in Princeton, in this state, in the year 1790, and after being well prepared entered Harvard College in the year 1807. He was there greatly distinguished by his ability and industry, and throughout his college course, up to the time when he was graduated, was the rival and competitor for college honors with the distinguished scholar and orator who still lives to shed the glory of his name and the influence of his character upon the state and nation. It is, I believe, entirely within the bounds of moderation, to say, that few students, if any, have passed through college with more entire devotion to its duties, and with more accurate and extensive learning acquired within its walls. He afterwards entered upon the study of the law, which he pursued with equal assiduity and success, partly in this city and partly in Litchfield, Connecticut, under the tuition of Chief Justice Reeve and Judge Gould, from whom, in common with all their students who appreciated the privilege of their instruction, he ever entertained and expressed a reverential and affectionate regard. During the period of his studies here, and for some time after, he was a member of a Law Club, composed of older students and younger members of the bar, which met weekly for the discussion of legal questions, and of which he was confessedly at the head. He was admitted to this bar in the year 1815, and entered upon the duties of the profession with a high reputa-

tion, and every prospect of immediate and permanent success. His practice soon became quite extensive and lucrative, and continued throughout his life to be highly respectable in this and other counties; though it was not at the maturer periods of his life so extensive and preëminent as his naturally great abilities and varied and substantial learning and untiring industry would naturally have been expected to secure, and as, at the earlier periods of his life, was universally anticipated. How far this circumstance is to be explained by the peculiarities of his intellectual and moral faculties and developement — or by the peculiar incidents of his life — might be an interesting theme: but this is neither the time nor place for its consideration.

In contemplating the mental characteristics by which he was distinguished — among the first presenting themselves was an untiring and boundless mental activity, which seemed wholly unconscious of the need of repose. His faculties appeared to be always fresh and in full play; he sought rest only in change of occupation — not in cessation from labor. The next was a remarkably comprehensive and accurate memory. Very few men, with the same opportunities, had stored up so large an amount of useful and interesting knowledge upon the various subjects of general study and interest. Nor was it heaped in a mingled and incongruous mass, but all was well arranged, classified and ready for use, and poured out in discussion, or conversation, with an ease, freedom and abundance, often surprising to those of more limited powers of acquisition. His logical acumen was hardly less conspicuous. No man reasoned more accurately upon premises granted, or assumed; and no one more instantaneously detected a sophism in the reasoning of his adversary. His errors in deduction and conclusion were not found in the superstructure, but were to be sought for in the foundation. And had the soundness of his judgment been greater, or his ingenuity less, there would seldom have been cause to question the accuracy of his opinions.

But the most striking faculty of his mind, and that which, perhaps more than any other, gave to it its peculiar cast, and influenced his professional life, was an unbounded ingenuity or faculty of combining all principles, sentiments and circumstances, past, present, or to be anticipated, into whatever form or substance the emergency calling upon him to deal with them might require for the end he had in view. It constituted an intellectual crucible, not indeed for separating discordant materials, or dissolving affinities, in order to a clear analysis or discriminating selection, but for fusing them into a mass in support of the hypothesis to be sustained, in the nature of which he himself was often deceived, and which baffled the power of his antagonist to melt or to break. A great power, indeed, but often as dangerous to the possessor as to others.

The last characteristic faculty to which I shall allude, was a ready wit, enabling him to expose pretence and nonsense in broad caricature, and to hurtle upon his adversary the shafts of raillery and sarcasm, when other weapons failed, or when instigated to retaliation for any actual or supposed slight upon himself or his case. And this weapon, dangerous in the hands of the most self-possessed and considerate, sometimes, unfortunately in his, inflicted wounds which continued to fester long after the conflict was forgotten by him, in the kind and genial feelings which were the natural elements of his regard for others. But it was only in conflict that the flash of the scimitar was seen or its edge unkindly used. In social and domestic life and friendly intercourse, his playful humor was always used to amuse or interest, and never to wound.

If there were any obvious deficiency in his intellectual endowments, it was in the want of imagination. He was in no sense imaginative. He lived wholly in the world as one in which every thing worth attaining or knowing must be found in the actual reality of what has been or what now is, or in its capability of present or future application to the business of life. And the want of this power, while it limited his circle of intellectual and spiritual enjoyment, also doubtless rendered him less able to understand the idiosyncracies of others, and to enter into that sympathy with their peculiarities of thought and feeling to which the natural kindness of his heart would otherwise have prompted him.

Such being his peculiar powers of mind, his acquisitions were in correspondence with them. His legal knowledge was thorough and extensive. The axioms and principles of the law were as familar to him as household words; and ancient and modern decisions were fresh in recollection, while his readiness of acquisition, unremitting industry, and tenacious memory, enabled him to master all the adventitious knowledge of science or fact which his case required. But his learning was far from being confined to his profession, and its incidental teachings. He loved her for her own sake in all departments of human knowledge, and especially in those relating to the nature of man, his history, capacity, and destiny. He was remarkably well versed in theology and its controversies, when much knowledge was useful and interesting, which is now happily hastening to be forgotten. His knowledge of history and of

English classical literature, was accurate and extensive — as was also that of the various mental philosophies with which the world has been from time to time instructed or amused.

But the learning for which he was most distinguished in later life, apart from that of his profession, was in Egyptian and Assyrian antiquities — and, to use the apt language of one of his friends to whom I am indebted for many particulars concerning him, "The favorite study of the latter part of his life was archæology. To this he devoted much of his spare time, and with enthusiastic interest. Whatever he could reach illustrative of the ancient world, he prized above all riches. He made Egypt, Assyria, and the legendary and historical East, his resting-place from care at night; and it was his dream by day for the last ten years of his life, that at some time he should be able to visit and explore the wonderful monuments of the Pharaohs, follow the track of the wandering Israelites, and see for himself the memorials of Nineveh."

Mr. Fuller had rendered valuable services in the City Council and State Legislature at various times during his whole professional life, and was distinguished as a powerful, courageous and ready debater, as well as for the resources of general and local information with which his mind was stored, and which, seasoned with his happy humor, always secured for him a willing audience.

In alluding to the moral characteristics of our deceased brother, that which may be considered deserving the first notice, was the amiable and generous disposition which gave zest and beauty to his social and domestic life. I am informed from the most satisfactory source, and the statement is confirmed by my own experience as far as it extended, that in private intercourse he was uniformly kind, forbearing, and self-sacrificing; that no intolerance or diversity of opinion, and no temptations for the exercise of his wit, were suffered to mar the happiness of the friendly or family circle; and that his intercourse with the students in his office was marked not only by a general urbanity and desire to conciliate their good-will and respect, but still more so by his friendly interest in their feelings and professional prospects and aspirations, and a studious use of all opportunity of impressing upon them a due sense of the true dignity and moral responsibilities of the profession.

Next in prominence may be ranked an undaunted courage, rendering him fearless, — I might almost say, reckless of consequences in the utterance of his convictions, and the vindication of the supposed rights of his clients or of himself, — which was sometimes, perhaps, too plainly evinced even in the halls of justice and legislation, and which, united, as it was, with an excitable temperament, doubtless formed one of the main sources of that indomitable energy, rendering him capable of accomplishing so much, and at the same time exposing him sometimes to errors, which men of less bravery or greater self-command would have escaped.

Our friend was a firm believer in the truths of revealed religion, and rigidly observant of its institutions. He valued them equally for their influences upon himself and upon society — and spent much of his time in the contemplation and teaching of the great doctrines of Christianity. An interesting anecdote illustrative of the practical workings of his faith, and of his reverential and affectionate regard of his ancestors and kindred, has been recently narrated to me. A short time since he collected together the surviving descendants of his father and mother at the place where their children were born, and after carefully tracing out the almost obliterated remains of their dwelling, — standing upon this grave of the family hearthstone, — they united in religious adoration of the God whom they had been taught to worship. He was eminently conservative in his political and social principles, and all his tastes and feelings. He was in no sense a reformer. He judged of man by the history of what he had been, and the experience of what he has become. He had no faith in his ability to leap from earth to heaven by the aid of any newly invented moral machinery, but relied wholly upon the progressive influences of probationary discipline; but he was generous and ardent in the advancement of the means which experience had tested and found good. I hardly need add, in this presence, that he was scrupulously honorable and conscientious in observance of all those obligations to the Court and his brethren at the Bar, which are essential to the security and dignity of the profession, — and without fidelity to which, the forensic contest sinks into vulgar and savage warfare.

Such were the peculiar mental and moral characteristics of our departed brother — and in them, and the character formed out of them, we may behold much to respect and admire, — and the sources of all that we may have had occasion to regret.

If he had, what may have seemed to us, at times, an exaggerated confidence in his own opinions, we are to remember the great extent of his knowledge, the readiness of his memory, his boundless ingenuity and self-relying courage, and faithful

industry in forming them; and that he asserted none which he did not honestly entertain. If we have smarted under the keenness of his satire or invective, we must bear in mind that we are not always sure that it may not have been justly provoked: and at least give him praise, that one of the most dangerous weapons with which humanity is entrusted, was never used by him but in the heat of conflict, nor ever allowed to cut asunder the ties of social and domestic intercourse.

The character of the deceased, viewed as a whole, presents a combination of eminent mental powers and moral qualities, enabling the possessor to accomplish much for the good, or much for the evil of his fellow-man. And surely it is no humble claim which he presents to our affectionate and respectful remembrance, that they were uniformly and consistently devoted to the service of God and humanity; that no allurements of ambition, no disappointment of early hopes or aspirations, no vindictive or ungenerous temper of mind ever diverted him from the chosen path of religion, duty and honor in which he first elected to walk; and that after a life of assiduous labor and painful vicissitudes, in one of the most arduous and responsible callings of society, he has gone down to an honored grave, with no stain upon his reputation and many blessings upon his name.

Mr. Loring then read the resolutions which he had been commissioned to present, — to which Judge Fletcher responded as follows: —

It is an impressive fact, that, he whose decease is now brought feelingly to our minds, and occupies our thoughts, but some three or four months since stood up in this place in behalf of his brethren, to announce the death of an eminent and highly respected member of this Bar. He stood here with an active and vigorous mind and with fervent and earnest feelings, and portrayed with great justness of thought and felicity of language, the excellence and worth of our then deceased brother. The voice, then so animated and eloquent, is now silent in death. Such is the frail and uncertain tenure of human life. It is highly fit and proper that he who so worthily commemorated the departure of another should himself be appropriately commemorated.

The resolutions and address now presented are eminently appropriate and impressive. Such are the diversities of human talents, and such the various and nice distinctions of human character, that to exhibit justly the distinguishing gifts and peculiar characteristics of an individual is always a delicate and difficult task. The course of life, the talents, the character, the professional eminence and moral worth of our deceased brother have been so fully and faithfully set forth in the resolutions and address before us, that I shall confine myself to some brief and general remarks.

It is not unworthy of notice that during his collegiate course, that period of youth which, in most cases, foreshadows with wonderful accuracy and distinctness the future man, our late brother exhibited high and generous aspirations for excellence, and raised himself by his efforts to the first rank in a class remarkable for distinguished scholars. He is now remembered by some of this Bar, as a teacher at Exeter Academy, after he had taken his degree at the University. After having completed the regular term of professional study as established at that time, he was admitted to the practice of the law in this county in 1815. His talents and qualifications were such as to introduce him speedily to business. He was active and industrious in his habits, with a quick apprehension, and a readiness and facility in the management of affairs. When I first came to this Bar, which was but a few years after he was admitted to practice, I found him actively engaged in business, exhibiting on all occasions the readiness, activity, ability and energy which characterized him through life.

The life of a lawyer is a life of unceasing toil. There is no royal road to success in the law. There are no intellectual gifts which will dispense with the necessity of persevering labor. The knowledge of the law does not come by inspiration. Eminence in this profession can be reached only by incessant toil and effort. But there is, perhaps, no pursuit in which good habits, good principles, persevering diligence, with competent capacity and attainments, will so surely ultimately reap their reward as in the profession of the law. Mr. Fuller entered upon his profession with high and honorable aims. He had that quality which, perhaps, more than any other, makes the differences in the characters and fortunes of men, — a determined will. He commenced the practice of his profession — relying wholly upon his own efforts and his own powers, and with the full determination to make it the successful business of his life, and nothing could divert him from his purpose. For six and thirty years he remained steadily, actively, and resolutely engaged in his chosen field of labor. Those of us who have grown old with him can well remember how surely he was always to be found, full of animation and activity, in all the stirring and busy scenes and walks of professional life. Neither the long period that he had been at the bar, nor his own advanced age, seemed in

the least to have damped the ardor with which he engaged in his professional pursuits. He had great buoyancy of spirits and an unwavering self-reliance. No opposition could daunt, and no defeat or disappointment could dishearten him. He always came into the forensic conflict full of hope and full of courage, and well furnished with all the armor, which indefatigable diligence and talent could supply.

No man could be more faithful and devoted to his clients than he was. He spared no labor, but was unremitting in his efforts to promote their interests. In season and out of season he was always vigilant and active, and untiring in the performance of all his professional engagements. This fidelity to his clients, with his known talents and capacity for business, gave him an extensive practice in all the various departments of his profession. The eminence which he attained, and the confidence which he enjoyed, are set forth in the resolutions before us. He felt the high obligations of his profession, and I do not think that he would at any time have hesitated for a moment to have afforded his aid to a client because he was poor or unable to compensate his labor, but would at once have engaged in his cause with all his accustomed zeal and fidelity, without the hope of fee or reward. He had great quickness of apprehension and readiness in reply, which are highly important qualities in an advocate in the examination of witnesses, and in conducting trials before the jury. His addresses to the jury always exhibited a ready flow of language, and great ingenuity and ample resources of mind; and in some of his more recent arguments which I have heard, and which are now in my memory, and to which, therefore, I more particularly refer, he seemed to me to discover peculiar and uncommon ability. His arguments on questions of law were always carefully and thoroughly prepared, and manifested extensive research and a diligent and discriminating examination of authorities. Though Mr. Fuller confined himself very constantly and closely to his profession, yet, besides other offices, he served the public several years in the Legislature of the Commonwealth, as a member of the House of Representatives. He was remarkably ready and able in debate, and had many admirable qualities for a deliberative assembly, and his repeated elections by his fellow-citizens give evidence of the able and satisfactory manner in which his legislative duties were performed.

His ardent and active spirit could never be indifferent to any thing of public interest, and he was always prompt and ready to take his share of responsibility and labor in every thing in which the community around him was concerned. To his generous disposition, and to the kindness of his feelings, many who knew him well and intimately are willing and earnest witnesses. The memorials of his kind and generous deeds are strewn along the pathway of his life. No doubt his powers of wit and sarcasm, those powers which he possessed, and which are often dangerous to their possessors, and which he might not always regulate with sufficient care, and restrain within the limits of prudence, frequently caused disaffection towards him, and made an unfavorable impression as to his temper and his disposition, when no unkindness was felt, and no evil was intended by him.

That he was upright and honorable in the practice of his profession, his brethren of the Bar bear him ample testimony. It was by his fair, and liberal, and honorable course of life and practice that he won the high confidence, esteem and respect of his brethren, which are expressed in the resolutions now presented.

There has never yet been discovered any better mode of administering justice and of trying and settling the conflicting claims of parties, than by the agency of a learned body of men set apart for the purpose, and trained to the study and practice of the law. The profession of the law uprightly and honorably pursued, is an useful and honorable profession, but it brings with it high and solemn duties and responsibilities. The lawyer may use his best efforts and task his best powers in the cause of his client; but in all this he may not forget that his ministry is in the temple of justice. The lawyer who designedly, by artifice or fraud, deprives a party of his rights and thus defeats the purposes of justice, is unfaithful to his oath of office, and unfaithful to the high duties and obligations of his profession. There was no unworthy artifice or fraud in the practice of our deceased brother, but he acted in accordance with the terms of his oath of office, "with all good fidelity to the court, as well as to his client."

Of the religious character of our departed friend, this is not the time or place particularly and at length to speak, but I would not pass by in silence that trait of character which, in every one, is most important. He had great respect and reverence for the institutions of religion, and was an active and highly valued member of the Christian Church with which he was united, and labored much to promote the interests of other religious societies and institutions, and was always alive to the call of Christian duty. When, towards the close of life, he was withdrawn, by his disease, from the cares of business, and was left to his reflections in the retirement of his chamber, he became more and more deeply impressed with

the great truths, that man's highest relation is his relation to his Maker, and his first and highest duties, his duties to his God; and though deeply sensible of his own frailties, he was sustained by a Christian faith, and calmly awaited his removal from this scene of his earthly labors.

It is due to the memory of the deceased, and fitting for ourselves, that we may rightly improve the event before us, that we pause in our labors.

The resolutions which have been offered will be placed upon the records of this Court, and the Court will now adjourn.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Aldrich, Horatio N.	Lynn,	Aug. 22,	John G. King.
Allen, Abner B.	Conway,	" 9,	D. W. Alvord.
Babcock, Albert H.	Charlestown,	July 9,	Bradford Russell.
Bangs, Reuben L.	Truro,	Dec. 30, '51,	C. B. H. Fessenden.
Barton, Jabez W.	Boston,	Aug. 10,	John M. Williams.
Bassett, Alvan	Hardwick,	" 13,	Charles Brimblecom.
Belyea, David W.	Boston,	" 13,	Frederic H. Allen.
Blair, William	Shirley,	July 1,	Bradford Russell.
Bowditch, Galen W. et al.	Charlestown,	" 29,	Bradford Russell.
Brooks, Lewis S.	Lawrence,	Aug. 2,	John G. King.
Brown, Nelson S.	Lowell,	" 17,	Bradford Russell.
Cram, Benj. F.	Chelsea,	" 9,	Frederic H. Allen.
Crowell, Emmeline et al.	Dennis,	March 23,	C. B. H. Fessenden.
Crowell, Guilford et al.	Dennis,	" 23,	C. B. H. Fessenden.
Crowell, Hannah et al.	Dennis,	" 23,	C. B. H. Fessenden.
Dennison, Jonathan A.	Rockport,	Aug. 18,	John G. King.
Desper, James H.	Petersham,	" 13,	Charles Brimblecom.
Drury, Lucien B.	Marlborough,	" 16,	Bradford Russell.
Edson, Jesse	West Bridgewater,	" 31,	Perez Simmons.
Fay, Thomas G.	Boston,	" 23,	John M. Williams.
Fernald, Ammi C.	Boston,	" 27,	John M. Williams.
Field, Dwight	Erving,	" 7,	D. W. Alvord.
Fuller, Albert	Boston,	" 25,	John M. Williams.
Gilbert, Eliel	Prescott,	" 19,	Myron Lawrence.
Gilbert, Stephen W.	Prescott,	" 19,	Myron Lawrence.
Hawkes, Benjamin	Boston,	" 16,	Frederic H. Allen.
Hewitt, Salmon	Attleboro',	" 25,	E. P. Hathaway.
Hills, Joshua	West Newbury,	" 16,	Daniel Saunders, Jr.
Holmes, Enoch et al.	Charlestown,	July 29,	Bradford Russell.
Holt, Stephen B.	Andover,	Aug. 7,	John G. King.
Hyde, Alfred	Brookfield,	" 7,	Henry Chapin.
Joslin, Elias	Leominster,	" 26,	Charles Mason.
King, Horatio B.	Taunton,	" 25,	E. P. Hathaway.
Libby, Elbridge G.	Medford,	" 24,	Frederic H. Allen.
Moulton, William M.	Brookfield,	" 12,	Henry Chapin.
Nichols, Job	Holliston,	" 24,	Bradford Russell.
Nutting, David H.	Orange,	" 28,	D. W. Alvord.
Paine, Thomas H.	Weymouth,	" 10,	William S. Morton.
Parsons, William	Worcester,	" 7,	Henry Chapin
Phelps, Charles	Marlborough,	" 7,	Asa F. Lawrence.
Pierce, Alonzo	Roxbury,	" 11,	William S. Morton.
Porter, Warren	Weymouth,	" 16,	William S. Morton.
Pratt, William	Winchester,	" 16,	Frederic H. Allen.
Putnam, Barnes	Charlton,	" 19,	Henry Chapin.
Talbot, Lemuel T.	Taunton,	" 4,	E. P. Hathaway.
Thompson, William E.	Hanover,	" 31,	Perez Simmons.
Torry, Thomas R.	Pittsfield,	" 27,	Thomas Robinson.
Vining, Marten	Weymouth,	" 12,	William S. Morton.
Warren, Leonard E.	Brookfield,	" 31,	Henry Chapin.
Wheelwright, Ebenezer	Roxbury,	" 20,	Frederic H. Allen.
Whipple, Jeremiah P.	Boston,	" 12,	Frederic H. Allen.
Whitcomb, Isaac C.	Boston,	" 31,	Frederic H. Allen.
White, George W.	Chelsea,	" 26,	Frederic H. Allen.
Whitman, Jonas	Barnstable,	April 27,	C. B. H. Fessenden
Whittier, Henry C.	Worcester,	Aug. 14,	Henry Chapin.
Williams, Bradish W.	Mansfield,	" 27,	E. P. Hathaway.
Wingate, Andrew T.	Boston,	" 9,	Frederic H. Allen.
Wood, Asa	New Bedford,	" 7,	E. P. Hathaway.